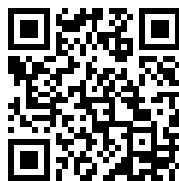


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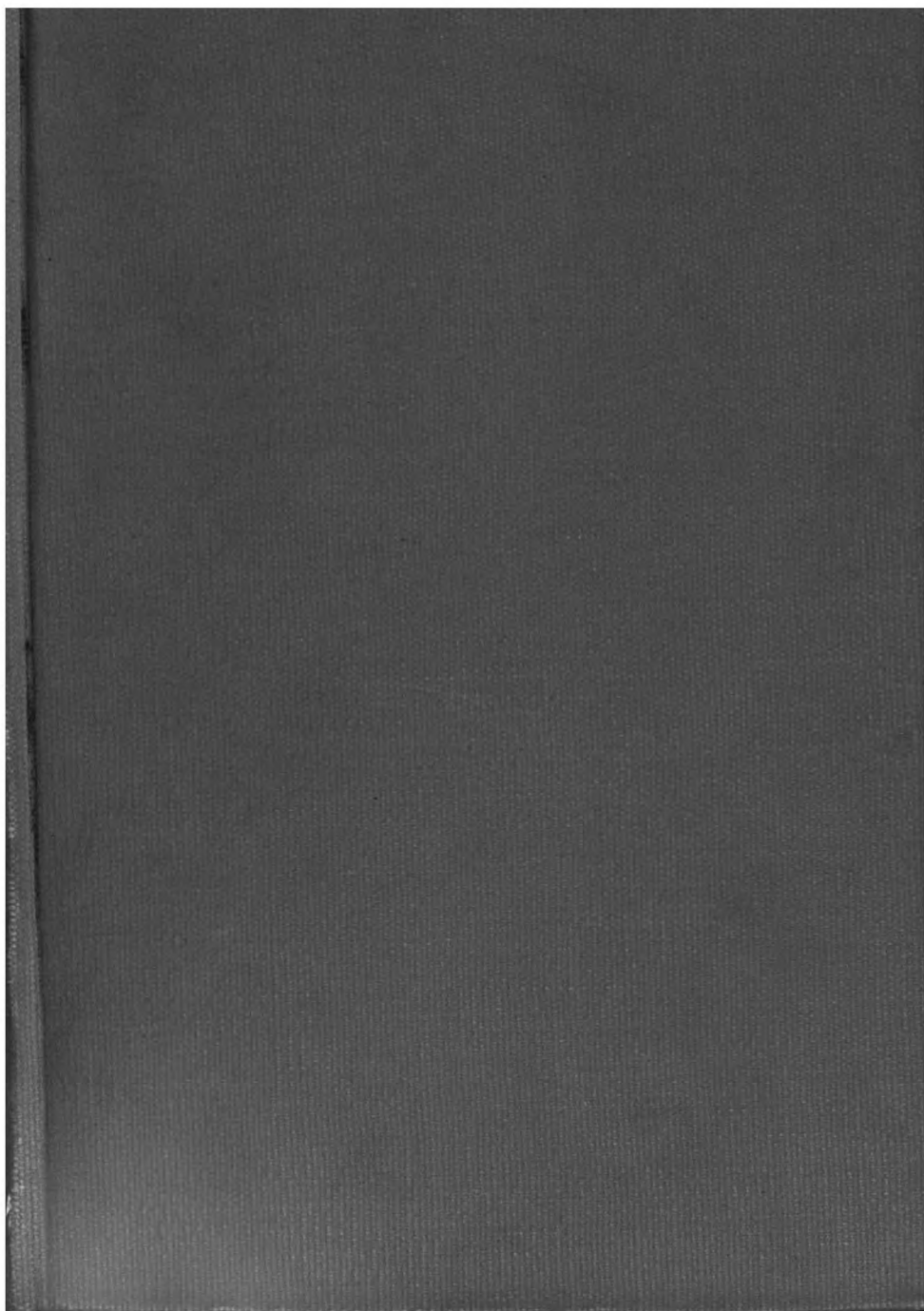








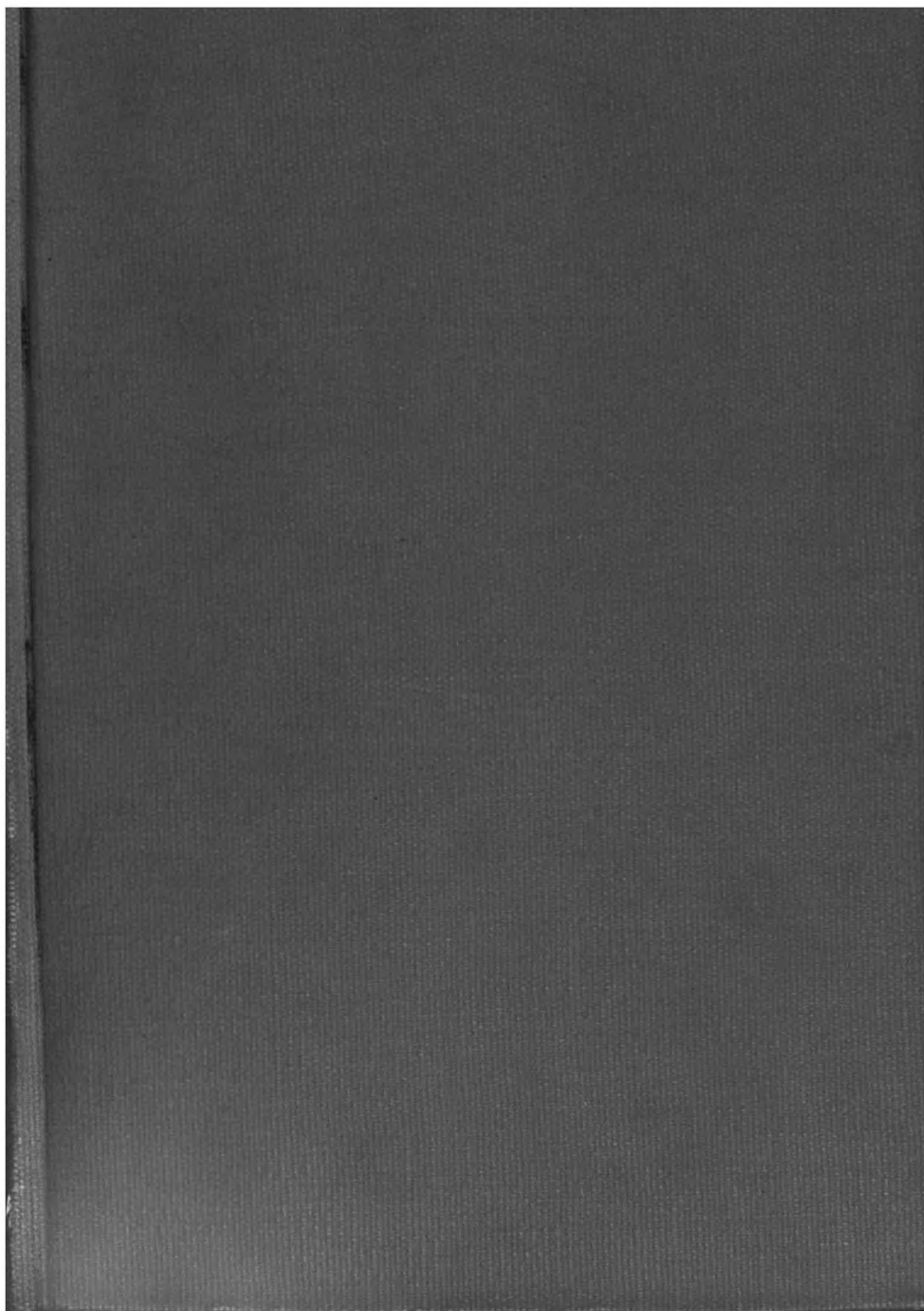




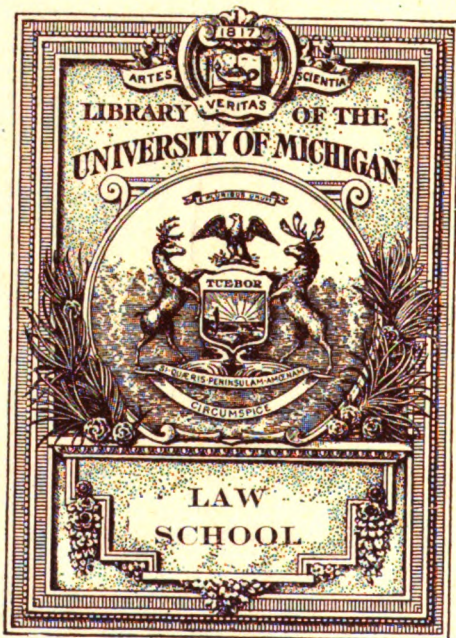














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THE  
TEXAS CIVIL APPEALS REPORTS

CASES ARGUED AND ADJUDGED

IN

<sup>7-10-02</sup> THE COURTS OF CIVIL APPEALS



THE STATE OF TEXAS

DURING

THE EARLY PART OF THE YEAR 1904.

A. E. WILKINSON,  
REPORTER TEXAS SUPREME COURT

B. R. WEBB,  
ASSISTANT REPORTER FOR THE COURTS OF CIVIL APPEALS

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# TEXAS CIVIL APPEALS REPORTS.

CHARLES F. BOGART v. L. B. MOODY.

Decided February 27, 1904.

## 1.—Innocent Purchaser—Patent—Investigating Title.

Purchasers of land need not go behind the patent in their investigation of title unless put upon inquiry by some extraneous fact or by the recitals in the patent or some subsequent link in their chain of title. *Wimberly v. Pabst*, 55 Texas, 592.

## 2.—Cases Distinguished.

*Sickles v. White*, 66 Texas, 179; *Browning v. Pumphrey*, 81 Texas, 163; *Dodge v. Litter*, 73 Texas, 319, distinguished.

## 3.—Deed—Delivery—Acknowledgment.

The rule that in the absence of other proof of delivery a deed is presumed to have been delivered on the date of its acknowledgment rather than on the date affixed to the instrument itself is but declaratory of the force of circumstances to establish the date of delivery, and is therefore absolute only when there is no other proof bearing on the issue of delivery.

## 4.—Same.

Deed bearing two acknowledgments of different dates, presumed, under circumstances stated in opinion, to have been delivered and to have taken effect from the date of the first rather than of the later acknowledgment.

Appeal from the District Court of Harris. Tried below before Hon. Chas. E. Ashe.

*Coleman & Abbott*, for appellant.

*L. B. Moody*, for appellee.

GILL, ASSOCIATE JUSTICE.—This was an action of trespass to try title brought by L. B. Moody against Charles F. Bogart for the recovery of certain lands in Harris County. A trial before the court without a jury resulted in a judgment for Moody and Bogart has appealed.

The plaintiff deraigned title through and under Daniel D. Culp, assignee and patentee as follows:

Date of patent June 6, 1844, filed for record April 20, 1846. Deed from Culp to John Shackelford, Jr., dated May 1, 1846, and filed for record February 4, 1854, expressing a paid consideration of \$1000. To this deed there are two certificates of acknowledgment, the first made in due form by H. C. Thompson, chief justice and ex officio notary public of Harris County of date May 1, 1846. The second also in due form before E. P. Hunt, notary public of Galveston County, Texas, of date February 5, 1852. There is no direct evidence of the date of the delivery of this deed, nor does the record furnish any explanation of the presence of the two certificates of acknowledgments, each reciting the personal presence of Culp, the maker of the deed.

A deed from Shackelford to Dennis Perkins, dated and recorded February, 1854. Heirs of Dennis Perkins to Henry C. and Geo. D. Perkins, dated April, 1873, and recorded January, 1874. H. C. and G. D. Perkins to L. B. Moody, February 3, 1903, recorded January 5, 1903. Moody was an innocent purchaser for value.



Defendant proved a deed from D. D. Culp to Augustus C. Daws, dated March 28, 1849, filed for record and recorded March 28, 1849, reciting a paid consideration of \$500 and connected himself by mesne conveyances with the deed to Daws.

Defendant also claimed under the heirs of Jno. R. Sleeper and showed himself the owner and holder of such title as they had. These heirs parted with such title as they had by deeds dated February and May, 1899. Evidence adduced by defendant showed that the certificate under which the land was located was issued to Samuel L. Williams, August 10, 1836. Written assignment in due form from Williams to John R. Sleeper, February 20, 1837.

John R. Sleeper died September 8, 1838, possessed of the certificate. Administration on his estate was taken out in the probate court of Harris County and under a void probate order the certificate was sold by the sheriff at execution sale, was purchased by Culp, and duly assigned to him by the sheriff. This assignment was in writing and disclosed upon its face the want of authority in the sheriff to make it. This transaction occurred in December, 1843, and the void assignment together with the previous assignment from Williams to Sleeper constitute a part of the records of the General Land Office and were kept in the particular file of which the certificate was a part. The land was located in May, 1844.

It does not appear that the heirs of John R. Sleeper ever asserted claim to the land in question except in so far as their deeds of 1899 may be considered as such, and this notwithstanding the administration upon the Sleeper estate remained open until 1850. The land is and has ever been unoccupied.

Under his plea of not guilty defendant seeks to defeat the plaintiff's claim under the following contentions:

1. For the reason that Daniel D. Culp procured the patent under a void assignment he took and held the legal title in trust for the heirs of Sleeper, and the invalidity of the assignment being manifest upon the face of the archives of the Land Office, purchasers under Culp will be conclusively presumed to have bought with notice of the trust.

2. In the absence of evidence of the date of the delivery of the deed from Culp to Shackelford, Jr., it is presumed to have been delivered at the date of the last acknowledgment, and this being subsequent to the execution and record of the deed from Culp to Daws, the legal title is in the claimants under Daws, and Shackelford having bought with constructive notice of the Daws deed, plaintiff has no standing in court.

The defendant contends that the judgment should be affirmed, because (1) he claims under an innocent purchaser for value without notice of the rights of the Sleeper heirs; (2) that the appellant's demand is stale as against the resulting trust created in Culp by reason of the facts; (3) that the claim under the Daws deed is not supported by proof of purchase for value and want of notice.

It seems to be fairly well settled in this State that purchasers of land



need not go behind the patent in their investigation of title unless put upon inquiry by some extraneous fact or by the recitals in the patent or some subsequent link in their chain of title. We quote the following from *Wimberly v. Pabst*, 55 Texas, 592:

"To the public generally a patent to land having been issued by the State carries with it a high degree of faith and credit as the beginning link in the legal chain upon which all after-acquired title can securely depend. When, therefore, a subsequent purchase is made upon the faith of a patent, regular upon its face, public policy requires that it should constitute an important element in the question of the good faith of the transaction and should turn the scales in its favor, except in case of actual notice or when the law would impute constructive notice of some defect sufficient to defeat it."

The court remarks further: "Whatever may be the rule as to the immediate patentee, we are clearly of opinion that public convenience and the free alienation and security of our land titles demand that a purchaser for value from or under him should not be chargeable with constructive notice by the patent of latent defects in the transfer of the certificate upon which it is issued when there is nothing in the face of the patent which would put a prudent man upon such inquiry as would lead to notice of those facts."

In the case cited a divorced wife sued for her interest in lands located under a 640-acre certificate issued to her husband by virtue of their marriage and therefore community property. The husband sold the certificate and a second assignee located it on 320 acres of land. Thereafter patent issued to the assignee, who sold to an innocent purchaser. It thus appears that the same question here presented was presented in that case, and the court held in effect that the purchaser after patent was neither constructively affected with notice of the character of the original certificate, nor did the recital in the patent that it was issued to an assignee put him upon inquiry. In that case, had inquiry been prosecuted, the original certificate would have disclosed the wife's community interest because issued for 640 acres, but it was held that as the patent conveyed only 320 acres, the amount patentable to a single man, the purchaser was not put upon inquiry.

The case is thus seen to be decisive of the question at issue, for here, as in that case, there is nothing in the patent to put the purchaser upon inquiry, save the recital that the patentee Culp was an assignee of the certificate.

The case of *Durst v. Daugherty*, 81 Texas, 650, is authority for the proposition. We quote from the opinion the following apposite expression: "A purchaser from Woodlief [the patentee, the ownership of the certificate being in another] in the absence of notice to the contrary, need not extend his examination \* \* \* beyond the patent. He can safely consider that the real title is in whom it is apparently vested."

The case of *Sickles v. White*, 66 Texas, 179, and *Browning v. Pum-*



phrey, 81 Texas, 163, hold it to be a question of notice in fact and not of constructive notice.

The cases relied on by appellant in support of his contention as to the effect of the archives of the Land Office on the issue of notice arose on contests as to the ownership of certificates before the issuance of patent, and while they partook of the nature of personalty, and are not in point for that reason. See *Dodge v. Litter*, 73 Texas, 319.

The question of the extent to which the rights of the parties are affected by the Daws deed will be disposed of without extended discussion.

It is not questioned that if the deed from Culp to Shackelford was delivered before the execution and delivery of his deed to Daws, the appellee holds the legal title as a claimant under the Daws deed. In such case the latter can prevail only upon a showing that Daws bought for value without notice of the Shackelford conveyance.

In the absence of other proof of delivery a deed is presumed to have been delivered on the date of its acknowledgment rather than on the date affixed to the instrument itself. *Kent v. Cecil*, 25 S. W. Rep., 715. Appellant contends that under this rule the last acknowledgment to the Shackelford deed must control. The rule itself is but declaratory of the force of circumstances to establish the date of delivery, and is, therefore, absolute only when there is no other proof bearing on the issue of delivery. Here the rule is not conclusive because there are two acknowledgments of different dates. After this great lapse of time it will not do to presume that the grantor acknowledged the Shackelford deed, retained it for six years, and finally consummated the sale according to its original terms. We should seek for a more probable solution. That the deed was delivered upon its first acknowledgment, and its validity being questioned, another was subsequently procured, is an explanation which is not only fair and reasonable but which is suggested by the facts at first glance, and certain other incidental facts strengthen this conclusion. The patent was filed for record April 20, 1846. The Shackelford deed was dated May 1, 1846, just ten days later. The first acknowledgment was of that date. The nearness of these three dates suggests that the record of the patent was a step in the preparation of the title looking to the consummation of the trade.

Whether the case be considered from the standpoint of Sleeper or of Culp as common source, the appellant is asserting an equitable title against the legal title of appellee.

Under Sleeper it devolved on appellant to show that appellee was not entitled under the facts to the protection accorded an innocent purchaser.

Under Daws it devolved upon appellant to show by proof other than the recitals in his deeds that he held under an innocent purchaser for value. *Turner v. Cochran*, 2 Texas Ct. Rep., 309. Neither of these burdens has been discharged nor has any valid reason been shown for the reversal of the judgment. It is therefore in all things affirmed.

*Affirmed.*

Writ of error refused.



SOUTHERN TRADING COMPANY v. STATE NATIONAL BANK  
OF FORT WORTH.

Decided February 27, 1904.

**1.—Usury—Penalty—Agreement of Indemnity.**

One who has not promised or paid usury to a bank on a loan made by it, but has merely agreed to indemnify the bank against a judgment collaterally connected with the loan as to which usury is claimed, has no right to recover a penalty for usury which he can assign to another.

**2.—Same—Loan on Condition of Paying Another Debt.**

The fact that upon a loan of money by a bank it exacts as a condition to making the loan that the borrower shall secure to it the payment of another genuine and subsisting debt to it for which the borrower is liable, does not render the loan usurious; nor is the case altered by the fact that the other debt is of such nature that the borrower, upon paying it, can not have contribution from the other parties jointly liable with him therefor.

Appeal from the District Court of Tarrant. Tried below before Hon. M. E. Smith.

*Bomar & Bomar*, for appellant.

*W. P. McLean*, for appellee.

**SPEER, ASSOCIATE JUSTICE.**—Appellant, the Southern Trading Company, a corporation, instituted this suit under section 5198 of the Revised Statutes of the United States, to recover from appellee, a national bank, about \$20,000 as a penalty for illegally demanding and receiving usury upon a loan of money. The Citizens Light and Power Company of Fort Worth, another corporation, intervened. The trial court, after the evidence was in, instructed a verdict for the defendant; hence this appeal.

No useful purpose would be subserved by a statement in detail of the evidence, but we will content ourselves with brief conclusions as to the facts established by the uncontroverted testimony.

G. E. and R. I. White were at one time largely indebted to the State National Bank, probably as much as \$50,000, and to one A. D. Thomas in the sum of about \$5000. W. B. and John C. Harrison, president and cashier, respectively, of the bank, also became liable with the Whites upon the indebtedness to the bank. At a meeting of the directors of the Standard Light and Power Company, at which were present the Harrisons and Whites, it was resolved to pay to C. E. White, president of the company, and R. I. White, the manager, and to John C. Harrison, the secretary and treasurer, salaries amounting in the aggregate to \$500 per month, the same to be credited on the indebtedness of the Whites to the bank. Thomas brought suit against the Whites, the Harrisons and the State National Bank to recover back the sums thus paid as salaries, for the benefit of the Standard Light and Power Company, alleging a fraudulent conspiracy among the parties named. This resulted in a judgment for about \$9000 against all the parties, it being



held, however, that the amount paid to John C. Harrison was a proper item of expenditure. This judgment was subsequently affirmed by the Circuit Court of Appeals at New Orleans. Pending this suit the indebtedness due to the bank was paid; and in order to indemnify the bank and the Harrisons against loss by reason of any judgment that might be rendered in the case, the Whites placed in the bank and with the Harrisons about the sum of \$2765, to be by them held until the termination of said suit, it being supposed by all the parties that this amount would be ample to cover any possible judgment ultimately rendered in the case. About this time G. E. and R. I. White organized the appellant, Southern Trading Company. While this suit was yet pending and during the progress of the receivership instituted at the instance of Thomas, receivers' certificates were issued to the extent of about \$22,500. The property of the Standard Light and Power Company was ordered sold by the court, and the Southern Trading Company, desiring to purchase the same, made application to the appellee, and obtained from it a loan of about \$21,261.25, with which to make payment for the property. In the meantime the sum of money deposited with the bank as an indemnity had been taken down by mutual consent, and the \$22,500 in receivers' certificates, which had passed into the hands of the Southern Trading Company, had been substituted therefor. The bank made the loan and paid the \$21,261.25 to the receiver on the Southern Trading Company's bid, and accepted a note signed by the Southern Trading Company and indorsed by G. E. and R. I. White, due six months after date, bearing 8 per cent per annum interest, and providing for the payment of 10 per cent attorney fees if the same should not be paid at maturity. This note was secured by a chattel mortgage upon the property sold; the agreement also provided, in effect, that whatever amount should fall to the receivers' certificates from the Thomas judgment should be applied to the satisfaction of that judgment, and in the event there was yet a balance due that the bank should pay two-fifths and the Southern Trading Company the remaining three-fifths of the same. When the Thomas judgment was finally affirmed for the amount mentioned, it became an asset of the Standard Light and Power Company, and the distributive portion allotted to the receivers' certificates, amounting to \$5171, was by the direction of R. I. White, president of the Southern Trading Company, and in pursuance of the previous agreement referred to, applied by appellee to that judgment. The \$21,265.25 note was not paid at maturity, and was placed in the hands of attorneys for collection. The Southern Trading Company had at this time conveyed all the property to intervener, Citizens Light and Power Company of Fort Worth, a new corporation organized by the Whites, but which in no way assumed the payment of the note to appellee. The bank had caused the trustee to advertise the property for sale, and in consideration of its agreement to forbear pressing the collection, and to postpone the trustee's sale of the property for a definite time, the Citizens Light and Power Company and the Whites agreed to hold the Harrisons and the



bank harmless from said judgment, and to pay the same. The first moneys realized on the receivers' certificates, which amounted to \$5683.24, was applied as a credit on the \$21,261.25 note. Subsequently, and after the postponement of the trustee's sale, from the proceeds of a sale of its bonds, the Citizens Light and Power Company paid the balance of the \$21,265.25 note, including \$1244 interest, which did not exceed the 8 per cent stipulated; and paid the further sum of \$4500 to the bank as indemnity against loss on the Thomas judgment. The Whites owned practically all the stock of the Standard Light and Power Company, the Southern Trading Company and the Citizens Light and Power Company, and these corporations were but other names for G. E. and R. I. White, who were at all times insolvent, and who conducted their business mostly through these media. The Citizens Light and Power Company assigned to the Southern Trading Company whatever rights it had against appellee to recover a penalty for the payment of usury. Appellee would not have loaned the money except for the prospect of thus securing itself against the payment of the Thomas judgment, but had no intention of adopting this plan as a device or scheme for securing usury from appellants, further than the facts mentioned would necessarily have that effect, if they did so. The Whites recognized that they were morally and legally obligated to discharge this judgment in toto, and that it would be inequitable for the bank or the Harrisons to pay any part of the same. As will be readily seen, the payment of the items of \$5171, proceeds of the receivers' certificates, and \$4500 derived from the sale of the Citizens Light and Power Company's bonds, together with the \$1244 interest, constituted the usurious interest alleged to have been paid by appellant and forms the basis for the recovery of the penalty in this case.

We think the undisputed facts fail to show a case which would entitle appellants to recover. Clearly as to the Citizens Light and Power Company there could be no recovery, for the simple reason there never was any contract between it and the bank for the loan, and the company never at any time assumed or promised to pay the debt in any manner whatever; its agreement was to indemnify the bank against the payment of the Thomas judgment; it then thought the postponement of the trustee's sale of its property a sufficient consideration for its promise, and as we see the case, never having promised or paid usury, had no right to recover a penalty which it could assign to appellant or anyone else.

Nor is the Southern Trading Company in any better position. While it borrowed the money and contracted to pay in addition to the 8 per cent interest three-fifths of the amount of the Thomas claim remaining unpaid after the application of the proceeds of the receivers' certificates then hypothecated with the bank, still the evidence shows that it not only has not paid usury, but has not repaid the principal of the loan. The Citizens Light and Power Company paid the greater portion of this debt out of the proceeds of a sale of its bonds, and in like manner it paid



the \$4500 on the Thomas judgment, as has already been shown. We fail to find any evidence whatever that the Southern Trading Company owned these bonds, or any interest in the proceeds arising from their sale. Even, therefore, if the Southern Trading Company undertook to pay an unlawful interest for the loan made by the bank to it, which we do not mean to indicate is the case, it has nevertheless not done so, and therefore has no support in its claim for the penalty in this case. The Whites can not recover because, if for no other reason, they have not sought a recovery. So much for the status of the respective parties, if we treat them all as having a separate and distinct identity, as appellants treat them. On the other hand, if we view the transaction, as we think we ought, in the light of a contract upon the part of the Whites to borrow \$21,261.25 from the bank, and in addition to paying 8 per cent per annum interest thereon, to hold the lending bank harmless from the payment of the Thomas claim, we still think the transaction free from usury. It is not always an easy task to say when a contemporaneous agreement imposing upon a borrower a burden in addition to the payment of the highest legal rate of interest will taint the transaction with usury.

Mr. Tyler, in his treatise upon Usury, at page 141, upon the authority of an early New York case, says that "the fact that upon a loan of money the lender exacts as a condition of his making the loan that the borrower should secure to him the payment of a subsisting and genuine debt due him from a third person does not, per se, render the loan usurious."

In *Bishop v. Bank*, 41 S. E. Rep., 43, a much later case than the New York case, the contrary doctrine seems to have been held; it is there said in effect that where a lender requires, in addition to the full legal rate of interest, as a condition precedent to making the loan, that the borrower shall assume and pay off a promissory note held by the lender against another who is known to be insolvent, and which note the borrower was under no legal or moral obligation to pay, it constituted an usurious transaction. It is very generally held that where, in addition to demanding the highest rate of interest for a loan, the borrower is required to purchase from the lender something at an exorbitant price, or something which the borrower does not need or want, the transaction becomes thereby marked as a cover for usury; and the general rule seems to be as stated in *Campion v. Kille*, 14 N. J. Eq., 232, as follows: "In the construction of the statute against usury, the courts have held with undeviating uniformity that where the real transaction was a loan of money, no shift could evade the statute. No matter under what guise the loan was concealed,—whether by sale of goods, transfer of stock, taking bond for larger amount than loaned, passing off depreciated paper, or by any other expedient,—the court will strip off the guise, and ascertain the true nature of the transaction." Mr. Tyler also says, upon the authority of 36 Barb., 649, at page 143, "that an agreement



by a borrower to pay a subsisting debt of his own in consideration of a new credit is not usurious, if the purpose is to pay only the amount actually due on the old debt, and the amount of the loan with lawful interest."

So, as to the Whites, the most that can be said is that, in addition to paying 8 per cent interest on the money borrowed by them, they undertook and agreed also to pay the Thomas judgment; but it will be observed that this claim or judgment constituted a just and legal demand against the Whites, and one for the payment of which they were as much bound as the appellee; they were not required by the bank to do more than to pay a just debt for which they were already fully liable. It would be, we think, a shocking proposition to assert that the Whites, by reason of having paid 8 per cent interest, as such, for this loan, and also having discharged their own debt, could recover a penalty against the bank as for usury paid it. The nature of the judgment is such that the party paying it can not seek contribution from the other judgment debtors, but this can not change the result. Appellee is in no better or worse position, with respect to the Thomas judgment than if the Whites had voluntarily paid the same. We fail to see how, in any view of the case, this payment by them can be regarded as a payment to the bank of usury. The fact that the bank stipulated for 8 per cent interest only, when it might have taken more, and all the other circumstances in the case indicate that the plan here adopted was not intended as a guise for usury, but was a bona fide transaction, satisfactory alike to all the parties, whereby the Whites would be enabled to purchase property which they very much desired, and at the same time to pay a judgment which they recognized that they, rather than the bank, were morally liable for. We think the trial court did not err in summarily directing a verdict for the defendant, and its judgment is affirmed.

*Affirmed.*

Writ of error refused.



## S. F. SINGLETON V. J. H. HOUSTON.

Decided February 27, 1904.

**1.—Contract of Leasing—Rescission for Fraud.**

Where plaintiff and defendant jointly executed a contract of leasing by virtue of which each party respectively leased certain lands to the other in exchange for a lease therein of the other's land, and such lease contract was made by plaintiff on the strength of defendant's representations that he was entitled to the use and control of the lands so leased by him to plaintiff, the latter was entitled to a cancellation of the contract upon proof showing that defendant did not, except in small part, own or control the lands he had undertaken to lease to plaintiff, and had not since acquired such ownership or right of control.

**2.—Same—Legal and Actual Fraud.**

It was immaterial that defendant's false representations as to his control of the lands were innocently made, as the case would still be one of legal fraud.

**3.—Same—Immaterial Error.**

The erroneous rejection by the court of evidence showing defendant entitled to the control of a part of the lands for a part of the term of the contract was immaterial where defendant's representations would still have been untrue to a material extent and plaintiff therefore entitled to a rescission.

Appeal from the District Court of Mitchell. Tried below before Hon. C. H. Earnest, Special Judge.

*W. B. Crockett*, for appellant.

*Smith & Smith*, for appellee.

SPEER, ASSOCIATE JUSTICE.—J. H. Houston instituted this suit in the District Court of Mitchell County against S. F. Singleton, seeking upon various grounds the cancellation of the following contract:

"State of Texas, County of Mitchell. This contract and agreement made and entered into on this 19th day of June, 1902, by and between S. F. Singleton and J. H. Houston, both of Lynn County, Texas, witnesseth:

"That in consideration of the mutual benefits to accrue and the amount to be paid as hereinafter stated, the said Singleton hereby agrees, binds and obligates himself, his heirs and assigns, to give the possession and use of all of sections numbers 11, 12, 15 and 16, and all of the lands lying east of the fence running north and south across sections 31 and 24 and halfway across sections 17 and 38 and to the south line of section 10 (said fence to be extended as hereinafter stated), all of said land being in block H, E. L. & R. R. R. Co., situated in Lynn County, Texas, the said use and possession to be for a period of four years from the date of this contract.

"And the said Houston hereby agrees, binds and obligates himself, his heirs and assigns, to give the possession and use of all of sections numbered 19, 17 (that part west of fence), 31, 33, and the south half



of section 37, E. L. & R. R. R. Co., block H, and also section 55, certificate No. 29, in block A1, same R. R. Co., all in Lynn County, Texas, this possession and use to be for a term of four years from the date of this contract.

"It is understood and agreed hereby that if the said Singleton furnishes the said Houston more acres of land in this exchange or "blocking" than said Houston furnishes said Singleton, then the said Houston is to pay the said Singleton, at the end of each year, lease on the said deficit or shortage at the same rate said Singleton was paying for said land.

"And if the said Houston furnishes the said Singleton more acres of land in this exchange of 'blocking' than said Singleton furnishes the said Houston, then the said Singleton is to pay the said Houston, at the end of each year, on the deficit or shortage, at the same rate said Houston was paying for said land.

"It is further understood and agreed that if any person shall procure any land in said Singleton's pasture, the said Houston hereby binds himself, his heirs and assigns, not to furnish said person with water for his stock, nor to allow such person to water his stock in said Houston's pasture on the lands controlled by said Houston.

"And the said Singleton hereby binds himself, his heirs and assigns, that if any person shall procure land in Houston's pasture, said Singleton will not furnish such person water for his stock, nor allow such person to water his stock in said Singleton's pasture on the land controlled by said Singleton.

"It is hereby agreed that the fence running north and south across sections 31, 24, and halfway across sections 17 and 38, in block H, E. & L. R. R. R. Co., in Lynn County, Texas, is to be extended to the south line of section 10, in same block, and that each party hereto is to furnish one-half of said fence to be so extended.

"All money due under and by virtue of this contract is to be paid in Mitchell County, Texas, and all damages accruing under and by virtue of this contract shall be recoverable and payable in Mitchell County, Texas.

"Witness our hands in duplicate, this the date first above written, each party hereto taking a copy hereof.

(Signed) S. F. SINGLETON.

(Signed) J. H. HOUSTON."

A trial was had before the judge, and judgment rendered in favor of plaintiff. The evidence authorizes the conclusion that, as an inducement to entering into said contract and as a consideration therefor, it was agreed and understood between the parties that Houston was at the time entitled to the use and control of the lands which he was to furnish to Singleton, and that Singleton was also entitled to the use and control of the lands which he agreed to furnish to Houston; that Houston



was so entitled to the use of all such lands as he had agreed to give in exchange, but that Singleton, on the contrary, did not own or control, nor has he since acquired the ownership or control, of any of such lands as he had contracted to furnish in exchange, except survey No. 11, block H. But for the representations and agreement of appellant Singleton to the effect aforesaid, appellee would not have entered into such contract. The evidence also supports the trial court's conclusions that appellant is liable to appellee in the amount of the judgment for rent or lease of lands used by him.

While we do not feel inclined to affirm the trial court's judgment upon the ground of partial failure of consideration, we nevertheless are of the opinion that the acts and representations of appellant amounted to legal fraud, entitling appellee to a rescission of the contract. We do not understand the law to be that in a case like this a partial failure of consideration would authorize a rescission; in such case the aggrieved party might be relegated to his action on the warranty, but in this case we think there is more than a mere partial failure of consideration. The gist of the agreement between the parties was an exchange of an estate for four years in certain lands, and the representations of appellant, even though innocently made, were nevertheless untrue, and the appellee relying and acting upon the same should not be bound by his contract when these representations prove false. It is legal if not actual fraud.

We are inclined to think the trial court erred in not permitting the lease from Slaughter to appellant when tendered in evidence by him. While this lease refers to lease contract No. 30561, issued by John J. Terrell, chief clerk and acting Commissioner General Land Office, etc., as the source of the lessor's title, which particular lease, it seems, was void, nevertheless such conveyance by Slaughter to appellant would, we think, convey whatever title Slaughter might then own in the surveys included. But while this is true, the testimony, if it had been admitted, would have shown appellant to be entitled to the use of sections 10, 16 and 24 for not exceeding fourteen months, the length of the unexpired lease from the State under which Slaughter really held. So that it will be seen had the testimony been admitted the result could not have been materially different; the agreements and representations of appellant would yet have been substantially untrue, and appellee entitled to his rescission.

We think a proper interpretation of the contract of the parties indicates an agreement for the exchange of lands as aforesaid, and not a leasing by the one to the other, as would be the effect of our decision were we to adopt the view of appellant. The provision of the contract requiring a payment of lease money at the end of each year by the one or the other of the parties according as there is an excess of land in his favor, we think grew out of the fact that it was uncertain at the



time of entering into the contract the exact number of acres each was supplying, and had no reference, as contended by appellant, to a probable loss of the control of the lands therein conveyed by the parties. Differently stated, we do not think the contract purports to be, or really was, an exchange of the possession and use of the lands of each to the other for such time only as each should retain his then right to the use and possession of the same.

The assignments complaining of the court's action with reference to the writ of injunction against appellant seem to contemplate the temporary writ, and will therefore be overruled.

The judgment is in all things affirmed.

*Affirmed*

Writ of error refused.



T. W. WOODWARD V. FORT WORTH & DENVER CITY RAILWAY  
COMPANY.

Decided February 27, 1904.

**Lease—Parol Reservation—Holding Over.**

Plaintiff verbally leased from a railroad local agent a part of the right of way for placing a coal bin thereon. After he had taken possession, the agent came to him with a written lease, executed by the general superintendent, containing a clause exempting the road from liability for injury to the lessee's property caused by fire. Plaintiff signed the lease, stipulating verbally that he did not assent to the exemption clause. The agent had no authority to make the verbal lease. The coal bin was destroyed by fire caused by sparks from an engine, after the expiration of the lease. Held, that plaintiff's verbal reservation from the written lease of the exempting clause was ineffectual; that his holding over after the lease had expired would be presumed to be under the terms of the written lease, and that a judgment denying him recovery for the property so destroyed was correct.

Appeal from the District Court of Hall. Tried below before Hon. Sterling P. Huff.

*W. M. Pardue, J. K. Duke, and G. A. Brown*, for appellant.

*Stanley, Spoons & Thompson*, for appellee.

CONNER, CHIEF JUSTICE.—Appellant was the owner of about 108 tons of coal of the value of \$620, and of the coal house containing the same situated upon appellee's right of way in Memphis, Hall County, Texas. Said coal and house were destroyed by fire alleged to have been negligently set out by the appellee's servants, and there was evidence tending to support this allegation.

The only defense that we consider necessary to notice was that appellant's occupancy of the premises was by virtue of a written lease in which it was specially stipulated and agreed that appellee should "not be held liable for any loss or damage by fire to appellant's said property communicated by sparks from appellee's locomotives or otherwise."

The two stubbornly contested issues were, (1) whether the fire resulting in the loss charged was set out or negligently permitted to escape from a passing locomotive; and (2) whether appellant's occupancy of the right of way alongside the extending tracks was under the written lease containing the stipulation pleaded in defense; or under verbal lease contract made by appellee's station agent without any such stipulation. On this appeal from the verdict and judgment against him, appellant presents some twenty assignments of error, but our principal difficulty has been to carefully consider the evidence and determine whether the verdict and judgment on the issues indicated are sufficiently supported. We have concluded that they are.

As already indicated, we agree with appellant that the evidence tended to show that the fire was negligently set out by the operatives of one of appellee's locomotives, but we can not say that it conclusively so ap-



appears. But if so, we feel unable to say that the evidence fails to support appellee's said special defense. It is undisputed that the property in question was situated upon appellee's right of way, and that appellant in fact signed a written lease with stipulation as pleaded; but he insists, as he in substance testified, that he entered upon the right of way and constructed his coal house and placed coal therein prior to signing the written lease, by virtue of verbal agreement with Mr. Moores, appellee's local agent, and "that nothing whatever was said at the time or at any other time between him (appellant) and Mr. Moores about the defendant railway company being exempted from liability for fire in case his building or coal should be damaged or burned." Appellant testified that he applied to Mr. Moores for the lease in October, 1899, and that "A. G. Moores told him (appellant) he would take my application and send it to the company, and asked permission for him to do so;" that a short time afterwards Mr. Moores told appellant that he "could have the land and that the company's terms were \$1 a year in advance, and that the term would run from the 1st day of January, 1899, and expire the 31st of December of that year." That these terms were agreed to by him, and the agent Moores went and showed him the ground on which to construct his coal bin, and that nothing was then said, as above quoted, releasing appellee from negligence. That the coal bin was completed and coal placed therein about the 27th or 28th of December, 1899; that "some time during the month of January, after my return from Colorado, A. G. Moores, defendant's agent at Memphis, came to me with a written or printed lease contract and requested me to sign the same; it was made out in duplicate; I read it over and stated to Moores that it did not contain the contract, and objected to it because of the clause therein containing exempting the company from liability for damage or loss occasioned by fire, and stated to the defendant's agent that said contract was out of date; that the term for which it was made had already expired, but defendant's agent and I discussed the matter and it was understood between us that for me to sign it then would not affect my occupancy of the right of way after that time, and I told Mr. Moores that I would not sign a contract exempting the company from liability after that time, and that I would get off the right of way before I would do so. Mr. Moores requested me to sign this contract so that he could collect his \$1 rent, and I accordingly did so and paid Mr. Moores \$1."

Appellant further testified that the fire occurred on the night of February 27, 1900, and that no written contract of lease, other than the one mentioned, had ever been signed by him. The testimony on behalf of the appellee, however, to the effect that A. G. Moores was without authority to make a verbal lease of any part of appellee's right of way, seems undisputed, and Moores testified, among other things, to the effect that when appellant applied to him for a lease he was told



that he (Moore) "would have to send his application to defendant's general superintendent at Fort Worth," who "would prepare lease and send to be signed, which I did about November 1, 1899. \* \* \* That Mr. Goode (defendant's superintendent) made out and sent to me about the middle of November, 1899, duplicate contracts of lease, one of which was to be kept by Mr. Woodward and the other returned to Mr. Goode. Mr. Woodward signed both contracts, kept one of them, paid me \$1, and I returned the lease to Mr. Goode, and sent the one dollar to the treasurer of defendant at Fort Worth. \* \* \* The lease shown me by defendant's attorneys and read in evidence is the lease signed by Mr. Woodward and returned to Mr. Goode. It has a date, December 22, 1899, opposite my name where I signed as witness of Mr. Woodward's signature." Witness stated that his best recollection was that the lease was signed upon that date, and the records in his office also showed that to be the date of his remittance of the \$1 lease money paid by appellant. Moore further testified that "Mr. Woodward made no objection to signing the lease, nor to the clause exempting the defendant from liability for damage caused by fire. The lease was in the usual form of leases used by defendant and furnished me for signature of persons desiring to lease the right of way. I made no parol agreement or contract with Mr. Woodward for lease of defendant's right of way, as I had no power or authority from anyone to bind defendant by any such contract, and I never offered or attempted to do so. \* \* \* I am sure that Mr. Woodward at the time he signed said lease said nothing whatever about the lease having expired, or that he could hold under any contract not in writing."

J. V. Goode testified in behalf of the appellee, that at the time in question he was employed in the capacity of its general superintendent; that about the middle of November, 1899, a written lease was prepared and forwarded for appellant's signature, which was returned signed. That he could not give the date exactly; "but I can say positively that this lease was executed by Mr. Woodward some time in December, 1899, and another lease was, I think, executed by him for the year 1900, some time between the 1st and 15th of January, 1900, but I can't say positively." He further testified that Mr. Moore was without authority to make a verbal lease, and that all leases executed by the company were written and contained the exemption pleaded in this cause, and that Moore "had no authority to waive or relax the rule, and was never given authority to do so."

It will be thus seen that if the written lease under consideration be treated as one that lost force and vitality December 31, 1899, as is contended by appellant, nevertheless there is evidence that undoubtedly tends to show that it was executed by appellant prior to its expiration and became effective, unless, as appellant insists, he could limit its effect by a reservation therefrom of the clause limiting appellee's liability, which we hardly think can be seriously contended by anyone.



If the written lease, therefore, became effective, and none was thereafter executed, the holding over by appellant must be deemed to have been upon the terms of his prior lease, upon the ground that the parties are presumed to have tacitly renewed the former agreement. See *Roller v. Zundelewitz*, 32 Texas Civ. App., 165, 73 S. W. Rep., 1071, and authorities therein cited. In addition to which the testimony of J. V. Goode, above quoted, should perhaps be construed as tending to show also that appellant in fact in January, 1900, and prior to the fire, had renewed his lease by the execution of a new lease upon the same terms as the original. If, therefore, appellant's occupancy of appellee's right of way at the time of the fire was under lease with limitation of appellee's liability as pleaded, no recovery for appellant's loss can be maintained, even though the proximate cause of such loss may have been negligence on appellee's part. See *Carter v. Railway Co.*, 95 Texas, 477; *Insurance Co. v. Railway Co.*, 175 U. S., 91; *Railway Co. v. Ordeltelheide*, 72 S. W. Rep., 684.

We conclude that the views so expressed are decisive of the material questions presented in this case, we not having found reversible error as assigned in the introduction or rejection of evidence, or in charges given or refused, that relate to the issues mentioned, nor in misconduct or irregularity on the part of the jury that would authorize us to disturb their verdict. All assignments are accordingly overruled, and the judgment affirmed.

*Affirmed.*



## C. WECKESSER v. J. L. LEWIS.

Decided February 27, 1904.

**1.—School Land—Application to Purchase—Additional Land—Mistake.**

W., an actual settler on a pre-emption survey, made application to purchase an adjoining survey of school land, intending to purchase it as "additional land," but through mistake, he being old and ignorant, the application was made out for the purchase of the school land as an actual settler on it. W. was entitled to purchase the land as additional land, and the statements of the application as made showed that fact. The Commissioner awarded the land to W., and after attention was called to the mistake, rejected L's subsequent application to purchase it as an actual settler and L brought this action of trespass to try title against W. for the land. Held, that W. was entitled to judgment for the land, notwithstanding the mistake.

**2.—Same—Collateral Attack—Presumption.**

L's action being a collateral attack on the sale by the Commissioner, who had the power to prescribe the form of the application, it may be presumed, in the absence of a contrary showing, that W's application sufficiently complied with the form then in use as to applications to purchase additional land, or that the regulations of the Land Office authorized the correction of such a mistake where the facts warranted the sale.

Appeal from the District Court of Hemphill. Tried below before Hon. B. M. Baker.

*H. G. Hendricks* and *C. Coffee*, for appellant.

*John W. Veale*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—The land in controversy, school section 78, block A2, in Hemphill County, after it had been duly classified as dry grazing land and placed on the market at \$1 per acre, was sold to appellant by the Commissioner of the General Land Office August 10, 1898, on his application of May 24, 1898, which on its face was an application to purchase it as an actual settler, accompanied with the affidavit, obligation and cash payment required of such purchasers. Appellant has paid the annual interest ever since his purchase, and the award to him has never been canceled. Instead, however, of being an actual settler thereon at the date of his purchase, he was then and has ever since been an actual bona fide owner of and resident upon other land contiguous to said land, namely, a tract of 160 acres patented to him and described in the record as pre-emption land. When he made his application to purchase the school land he thought he was applying for it as additional land. April 5, 1901, appellee, on discovering the condition of appellant's title, undertook to settle on the land himself, and the next day made application to purchase it, complying in all respects with the law, but his application was rejected. Then it was that appellant, an old and apparently ignorant man, became aware for the first time of the mistake made in his application, and sought to correct it by filing in the Land Office an amended application and affidavit dated April 16, 1901, in which it was disclosed that he was a bona fide owner of and resident upon the



contiguous 160 acres above mentioned, and claimed the land in controversy as additional land. The facts were thus stated in his testimony: "I am 78 years old in September; I filed on section No. 78 as additional land to my knowledge. At the time I filed I was living right on a piece of pre-emption land that I have got there, which is patented land, and which I have owned and lived on ever since. I had about fifty or one thousand dollars of improvements on it. They consisted of a house, well, stables, fence, garden and orchard. At the time I filed I was living upon my homestead adjoining this land. I had no intention of becoming a settler on this No. 78, for my house and improvements were all on my homestead. I filed upon this land believing I was making proper application to purchase it as additional land. My application was accepted and I never knowed no different but it was additional land, until Mr. Lewis told me of it after he put a dugout on it."

The original application of appellant was a substantial compliance with the law providing for the sale of school lands. The requisite cash payment was made, and the obligation for the deferred payments complied fully with the law. The affidavit also contained every requisite. Rev. Stats., arts. 4218fff and 4218j. True, it contained more than was required in the purchase of additional land, and the superfluous statement that he was an actual settler on the land applied for was not true; but why should this vitiate the sale? The facts entitled appellant to purchase the land as additional land, and if he had applied for it as such it should and doubtless would have been awarded to him. It was entirely immaterial, therefore, that the statement was false. It was not even morally wrong, because it was ignorantly made and without any motive whatever for making a false statement. The substance of the transaction was a sale of school land, and one which the Commissioner was authorized to make and did make, appellant having made the requisite cash payment, the necessary obligation and an affidavit that he was not acting in collusion with others for the purpose of buying the land for any other person or corporation and that no other person or corporation was interested in the purchase save himself, which was all the affidavit required by statute of a purchaser of additional land. The mere fact that the land was applied for on the wrong ground, and by mistake at that, the real facts authorizing a sale, did not deprive the Commissioner of the power to make the sale, but was a mere irregularity. Unless the award to appellant was absolutely void for want of power in the Commissioner to make it, the land was not subject to sale when appellee applied for it, and he had no case. Therefore, on the undisputed facts above stated and the court's findings of fact, which we adopt, the judgment will be reversed and here rendered for appellant.

Since the above was written the opinion of the Supreme Court in *Burnam v. Terrell*, 97 Texas, 309, 9 Texas Ct. Rep., 225,



has been published in which we find the following language, which seems to express a contrary view: "The relator further avers, that at the time he made his application to purchase sections 66 and 62, he was the owner of, and resided upon, another survey of land; that these sections were within a radius of five miles of such survey, and prays that, in the event these lands in controversy were not legally sold as detached lands, he be held a purchaser as an actual settler. It is sufficient in answer to this prayer to say, that in order to have entitled him to purchase as an actual settler his applications should have been placed on that ground, and in his affidavit he should have made oath as to the facts of his ownership of and residence upon his home survey. This was not done. Therefore, although he may have been competent to purchase as an actual settler, not having applied to purchase as such, he acquired no right by his applications unless the lands were in fact detached." However, that was a mandamus proceeding, in which the Supreme Court declined to compel the Land Commissioner to treat an application made to purchase detached land as a sufficient application to purchase additional land. The statute providing for the sale of school lands under which the sale in question was made required the person desiring to purchase land in accordance with its provisions to "forward his application to the Commissioner, describing the land sought to be purchased." Sayles' Stats., art. 4218j. The form of the application was expressly left to the Commissioner, the statute (article 4218c) declaring: "He shall adopt all necessary forms of applications for sales or leases," etc. We infer from the opinion quoted that the form of application adopted by the Commissioner for the sale of additional land was materially different from that adopted for the sale of detached land, the conditions of such sales being quite different. Without a compliance, therefore, with such regulation of the Land Office the relator was not entitled to mandamus. In the case before us, which was not a controversy between an applicant and the Commissioner, it does not appear what form of application the Commissioner had adopted and was using when the land was applied for and awarded to appellant. The statute gave him the power not only to adopt regulations not inconsistent with law, but also to "alter or amend such regulations." Art. 4218c. The essential conditions of a sale to an actual settler and of a sale of additional land, while not identical, are of the same nature. Actual settlement and three years occupancy of the land applied for in the one case are required, while bona fide ownership and residence upon the contiguous land and three years occupancy of it or of the additional land are required in the other. Inasmuch as the Commissioner declined to award the land to appellee and continued to recognize the sale to appellant after the mistake in the application was discovered, we think it should perhaps be inferred that the application met the essential requirements of the form then in use. But if not, as appellant had the right to purchase



the land as additional land and intended at the time to do so, the mistake in the application being harmless, he was equitably entitled to the land, having complied fully in other respects with the law, as much so at least as one who has by mistake made his settlement on the wrong section, which has been several times upheld.

Appellee was plaintiff in the action, which was one in the ordinary form of trespass to try title, and was not entitled to recover without showing that appellant's title was absolutely void, the attack being a collateral one, and consequently that the land was subject to sale on his own application. This, in our opinion, he failed to do. The regulations of the Land Office may have authorized the correction of mistakes, such as this, in applications where the facts warranted sales, and we can see nothing unreasonable or to the prejudice of subsequent applicants in such a regulation. All the presumptions are in favor of the action of the Commissioner.

The error in the judgment, though not assigned, being fundamental, requires a reversal and rendition for appellant.

*Reversed and rendered.*

Writ of error refused.



## J. A. BARNETT ET AL. V. T. M. PYLE ET AL.

Decided February 27, 1904.

**1.—Promissory Note—Delivery—Conditions.**

Where the action was on a promissory note, defendant's plea that the note had never been delivered was not sustained by proof showing that the note was given for part of the consideration of a sale of lands and cattle and that the seller and buyer jointly deposited the deeds and the note with a bank with instructions to deliver them to the parties respectively when the buyer should deposit with the bank the money called for by the note, which money he was to raise from a sale of the cattle he had so bought, and the cattle were delivered to and then sold by the buyer and the money placed in the bank, but the buyer instructed the bank not to apply it to the note until the seller had complied with a further condition which the buyer had not the right to exact.

**2.—Same—Tender.**

Under such conditions the deposit of the money in the bank was not a tender of it in payment upon the note.

Appeal from the District Court of Donley. Tried below before Hon. Ira Webster.

*J. H. O'Neal and W. M. Pardue*, for appellants.

*Browning, Madden & Truelove, W. B. Ware, W. M. Smith, and H. E. Deavor*, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—The promissory note declared on and read in evidence, dated August 1, 1902, due October 15, 1902, payable to J. A. Barnett in the sum of \$10,000, with interest at 10 per cent from maturity and attorney's fees of 10 per cent, and signed by T. M. Pyle, entitled appellant Barnett to judgment against appellee for \$7460, the principal having been reduced by credits to that sum, with interest and attorney's fees, as provided in the note.

The defense was twofold: first, that the note had never been delivered; second, that it had been paid. The execution of the note was not put in issue by a sworn plea, and the evidence utterly failed to establish any such defense. Payment or tender of payment was sufficiently pleaded, but was not proved. The reason for these conclusions will be found in the following statement:

Barnett agreed to sell Pyle his ranch and cattle in Hall and Childress Counties for \$24,000, to be paid as follows: Ten thousand cash; \$10,000 on five years' time, note to be secured by deed of trust on the lands to be conveyed; \$1000 in a house and lot in Clarendon, and Pyle to assume the payment of \$3000 which stood against the land. Pyle, not being able to make the cash payment, signed the note sued on with the understanding that the cattle were to be delivered to him free of liens, so that he might sell them and thus raise the first \$10,000 by October 15, 1902. He also signed the other note and the



deed of trust to secure it, assuming also the incumbrance above mentioned. At the same time Barnett signed deed to the lands. All the papers were then carried by both parties to the First National Bank of Memphis, Texas; and delivered to the cashier, who issued to each party a deposit slip, retaining a copy himself, as follows: "Deposited by J. A. Barnett for safe keeping with the First National Bank of Memphis, Texas, 8-1-02, checks as follows: 1 note for \$10,000, due 10-15-02; 1 note for \$10,000, due five years from 8-1-02; four deeds; one deed of trust; deeds to be given to T. M. Pyle when the first \$10,000 note is paid in full; deed of trust and other note goes to J. A. Barnett. Signed S. S. M." This occurred on August 1, 1902. The next day the cattle were delivered, and soon thereafter Pyle conveyed to Barnett the house and lot in Clarendon, and proceeded to sell the cattle and out of the proceeds to make payments on the note declared on, thus reducing the amount thereof to \$7460. In selling his herd of cattle to Pyle, Barnett guaranteed the number to be 500, reserving three, however, in case there should be 500 without them. The number delivered, not counting these three, was 514. Pyle, however, claimed four (but not the three reserved) in addition to the 514. These four seem to have been running with the herd sold to Pyle, but did not belong to Barnett, three of them belonging to his son and one to his granddaughter. He declined for that reason to deliver them as a part of his herd, and so stated at the time of delivery. Also the day before, just after leaving the papers at the bank, in conversation with Pyle, he stated that the three belonging to his son were not included in the trade, to which Pyle made no reply, but testified that he thought appellant was joking. Pyle, however, sold more than half of the cattle, including also the three belonging to Barnett's son, and in September, 1902, made two payments on the note, but at the maturity thereof, although he had the money to pay the balance, refused to do so unless Barnett would execute to him a bill of sale in substance declaring the number of cattle owned and conveyed by Barnett to be about 520 head, and that all were conveyed except the three reserved in the sale, and this notwithstanding the admitted fact that he had agreed with Barnett that no bill of sale would be required until after he had paid the note. Barnett, however, tendered him a bill of sale to the 514 head actually delivered, which he declined to accept, and instructed the bank not to pay Barnett the money placed with it to pay off this note unless he would execute the bill of sale prepared and left with the bank by Pyle for him to sign. In thus seeking to adjust the trivial controversy about the four cattle belonging to Barnett's son and granddaughter, which should have been settled in the justice court, Pyle assumed the risk of having to pay interest and attorney's fees as provided in the note he had executed, and must now take the consequences.



The bank followed Pyle's instructions in withholding the money from Barnett, but offered to pay it under the direction of the court, and should therefore not have been taxed with costs.

The judgment is consequently reversed and here rendered for appellant Barnett against appellee in accordance with the conclusion first stated above, and the appellant bank is ordered to pay the money held by it to appellant Barnett, to be applied as a credit on the judgment here rendered, with all costs both of this court and the court below taxed against appellee.

*Reversed and rendered.*

Writ of error refused.



## R. L. SMITHERS v. W. LOWRANCE ET AL.

Decided February 27, 1904.

**1.—Evidence—Examined Copy of Public Records.**

Article 2306, Revised Statutes, making duly certified copies of all public records admissible as evidence, does not exclude the common law method of proving such records by an examined copy, and hence the classification of school land as shown on the records of the General Land Office could be proved by an examined copy.

**2.—Same—Evidence of Custodian of the Record.**

Where the examined copy was made by an outside person, it seems that the evidence of the custodian of the record should have been adduced to show that the record from which such copy was made was the genuine record of classification in the Land Office, but no objection on this ground was made below, and so can not be urged on appeal.

**3.—Same—School Land—Error Not Rendered Harmless.**

Error in excluding plaintiff's proof of the classification and appraisalment of the land was not rendered harmless by the fact that he failed to show that he was an actual settler on the land at the time of his application to purchase it, by virtue of which he sued, since said proof would have been unavailing without the indispensable proof of classification and appraisalment.

Appeal from the District Court of Mitchell. Tried below before Hon. James L. Shepherd.

*Ed J. Hamner*, for appellant.

*Smith & Smith* and *C. H. Earnest*, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—Appellant brought this suit to recover two sections of school land, one of which had been awarded to him as his home section, February 16, 1900, on application filed in September of the preceding year, and the other as additional land. The home section had been applied for and awarded as dry grazing land at \$1 per acre. This award was afterwards canceled by the Land Commissioner on the ground that the land when applied for and awarded to appellant was classified as dry agricultural and appraised at \$2 per acre. Appellant undertook to prove that the change in the classification and appraisalment from dry grazing at \$1 per acre to dry agricultural at \$2 per acre was made after his application had been made and accepted, and in order to do so offered a purported copy of the classification and appraisalment record kept in the General Land Office, together with testimony of Ed J. Hamner, his attorney, to the effect that he had made the copy from said record, and that it was a correct copy of page 3 of said record as the same stood when the land was applied for and awarded to appellant; that he knew this from personal examinations made in the Land Office prior to the application and subsequent to the award. The evidence was excluded on the objection that the copy was an examined copy and not a certified copy under the hand and seal of the Commissioner of the General Land Office,



and "not therefore the best evidence;" and to this ruling error is assigned.

The rule is both ancient and familiar that public records are provable either by certified or examined copies in the absence of a statute making certified copies the only method of proof. 1 Greenl. on Ev., secs. 91, 508, 509. We have a statute on the subject (Rev. Stats., art. 2306) but it does not change the common law rule, which was thus stated by Justice Wheeler in *York v. Gregg*, 9 Texas, 85: "Being a document of a public nature, if there would have been an inconvenience in removing the original, it might have been proved by an examined copy, first having proved the genuineness of the original by the testimony of those who, from having had custody of the original or from information derived from other sources, can testify as to that fact (1 Greenl. on Ev., secs. 484, 485, 508), the rule being that every document which the party has the right to inspect may be proved by a duly authenticated copy; and where proof is by a copy, an examined copy duly made and sworn to by any competent witness is always admissible." Provision is made by our law for the examination of "any of the papers, records or files in the General Land Office" by "anyone desirous" of making such examination who "shall first obtain the consent of the Commissioner or the chief clerk in writing so to do, and an order for the detail of a clerk of said office to be present and superintend such examination." Rev. Stats., arts. 4045, 4047, 4048. It does not follow, however, that the person allowed to make an examination would be entitled to make a copy of the record so examined and thus avoid the payment of the fee fixed by law for making certified copies. Nor are we called on in this instance to determine whether the genuineness of the classification and appraisal record, an examined copy of which was offered, could properly be established without the evidence of the Commissioner or some clerk in the Land Office, for no such objection was made. We will add, however, that we do not very well see how an outsider could know such fact. It has been held that the custodian of a public record or document, to the exclusion of those not connected with the office, should be called to prove the loss of such record or document, and we incline to the opinion that the genuineness of said record or document ought to be proved in the same way. But as before seen, and as has often been held, a ruling on the admissibility of evidence is to be tested in this court alone by the objection made to it when it was offered.

We can not agree with appellee Lowrance that the judgment should be affirmed, notwithstanding the exclusion of the evidence as to the classification and appraisal of the land, because appellant failed to prove that he was an actual settler when he applied for the land. This fact, if proved, would have been unavailing without the indispensable proof of classification and appraisal. Besides, the making of the award, which was canceled on another ground, would seem to raise an inference of actual settlement, though we would suggest



that appellant proceed upon the next trial as if no award had ever been made to him.

For the error discussed the judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

ON MOTION FOR REHEARING.

It is true, as insisted in this motion, that the examined copy of the classification and appraisement record, if admitted in evidence, would not have shown any appraisement of the land in controversy; but the letter from the Commissioner of the Land Office, dated August 6, 1895, addressed to the county clerk of Kent County, and recorded by him in the classification and appraisement record of State school lands for that county, which was read in evidence, would, in connection with said examined copy, have shown an appraisement at \$1 per acre.

The motion is therefore overruled.

*Overruled.*



## H. L. NORRIS V. ZANE CETTI, TRUSTEE.

Decided February 27, 1904.

**Surety—Conditional Signing—Further Name to Be Added.**

A bond to secure C. was signed by S. and N. as sureties for the obligor, S. instructing C.'s agent at the time, and in the hearing of N., that the bond was not to be delivered until one B. had also signed it as a surety, but the bond was delivered and accepted without B.'s signature and without knowledge on the part of the sureties that his signature had not been obtained. Held that the condition and failure to comply therewith operated to release N. as well as S., since N. signed with the understanding that the bond was not to take effect without B.'s signature.

Appeal from the County Court of Tarrant. Tried below before Hon. R. F. Milam.

*W. S. Thomas and Bomar & Bomar*, for appellant

*C. von Carlowitz*, for appellee.

**SPEER, ASSOCIATE JUSTICE.**—On about the 10th day of December, 1902, one E. T. Hudson, desiring to engage in the beer business in Paris, Texas, entered into a bond to appellee, as trustee for the Texas Brewing Company, with appellant, H. L. Norris, and M. L. Sims as his sureties, conditioned that said Hudson should pay to appellee any and all amounts of money which he might become indebted to appellee for merchandise sold him and for empty cooperage. The present suit was instituted upon said bond to recover a sum of money alleged to be due under its terms. The court, a jury being waived, rendered judgment in favor of the surety Sims and against appellant Norris, who alone prosecutes this appeal.

It is the contention of appellant that he is not bound by his signature upon such bond, for the reason that he signed upon the condition and with the understanding that one John C. Burks was also to sign same as surety before said bond was to be delivered to or acted upon by the brewing company, of which condition the company had full notice. Another question is made of the application of a payment of \$360 made by said Hudson, but which question, according to the views we take upon the issue first presented, it will not be necessary for us to consider.

The evidence introduced upon the trial supports the finding of the trial judge that M. L. Sims, at the time he signed said bond, instructed E. L. Hudson, the obligor, and Mohrhardt, the agent of appellee, that the bond was not to be delivered or used until J. C. Burks had signed same as surety, and that said Burks never did sign same, and the same was delivered to appellee in violation of the instruction of said Sims, and that the agent of appellee knew at the time of said instruction by Sims to Hudson and Mohrhardt. The evidence further shows that appellant was present at the time and heard such instructions and under-



stood that Burks was to sign the bond, and never knew any better until long after the delivery of the same to appellee. We think under the facts of this case that Sims must be regarded as the spokesman for appellant in the matter, and that the condition imposed by him was such that the instrument constituted an escrow until properly signed by Burks, and that the signing by appellant was upon the same conditions. It was wholly unnecessary for appellant to repeat the language of Sims, for if the instrument was not to be delivered or used until Burks had signed the same, then clearly no liability whatever could attach as to any of the sureties signing it. Until delivered it is no instrument at all. We think the case is ruled by *Pawling v. United States*, 4 Cranch, 219, in which Chief Justice Marshall, in delivering the opinion of the court, made use of the following language: "Some distinction was taken at bar between the case of Todd and the other defendants. But the court is of opinion that no such distinction exists. The other defendants said nothing. They did not even acknowledge their signatures. Todd, holding the instrument in his hands, called upon the witness to take notice that 'we' (in the plural), 'acknowledged this instrument, but others are to sign it.' The two other obligors being present and making no other acknowledgment, are clearly to be considered as speaking through Todd, and executing the bond on the terms on which he executed it. Their condition, then, is the same. It is either an escrow or a writing obligatory with respect to all of them." See also *Carleton v. Cowart*, 45 S. W. Rep., 749; *Bank v. McAnulty*, 31 S. W. Rep., 1096; *Campbell Printing Press Co. v. Powell*, 78 Texas, 53; *Hurt v. Ford*, 36 S. W. Rep., 674.

We think the trial court erred in rendering judgment against appellant, and upon our conclusions of fact above noted, the judgment is reversed and here rendered in his favor.

*Reversed and rendered.*



## W. N. DAVIS v. R. E. BURNETT ET AL.

Decided February 27, 1904.

**School Lands—Award—Section Lying in Two Counties—Trespass to Try Title.**

Plaintiff sued in trespass to try title to recover a tract of school land lying across the line of K. and S. counties, and by virtue of a rejected application to purchase made by him in K. County under the Act of April 19, 1901. The land had been awarded by the Commissioner to defendants by virtue of an application made in S. County, the validity of which plaintiff assailed on the ground that the Commissioner had not given notice to the county clerk of S. County of the classification and valuation of the land. Held, that such objection could not avail plaintiff, since, if tenable, no valid award of the land could have been made to him without notification to the clerks of both the counties.

Appeal from the District Court of Scurry. Tried below before Hon. H. R. Jones.

*Ed. J. Hamner*, for appellant.

*Higgins & Curnutte* and *Beall & Beall*, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—Appellant sued appellees to recover four sections of school land situated in Kent and Scurry counties, each section lying partly in both counties. Appellant filed his application with the county clerk of Kent County subsequent to the applications of the appellees, which were filed with the county clerk of Scurry County. The lands were awarded to the appellees. Appellant controverts the validity of these awards on the ground that the Commissioner of the General Land Office had not given the county clerk of Scurry County written notice of the classification and valuation fixed upon each of said sections, although he had given such notice in Kent County, as provided in the first section of the Act of April 19, 1901 (p. 292), under which the applications of all parties were made.

But if appellant's construction of this law be adopted, we fail to see how it would benefit him in this case, he being plaintiff in the action; for, while it might prove that none of the appellees had any title, it would also prove that he had none. The first section of the act makes it "the duty of the Commissioner of the General Land Office to notify in writing the county clerk of each county the classification and valuation fixed upon each section of land in his county," and the second section provides that the application of an intending purchaser shall be filed in the county where the land "or a part thereof is situated." If, then, the statute should receive the construction that, in case of a section lying partly in two counties, notice must be given in both counties, the sections in controversy were not on the market at all. Unless the whole of each section so situated was on the market none of it was. At all events, appellant applied to purchase the whole, and not merely the



part situated in Kent County. If the whole was on the market, then it was subject to sale on application made in either county, for the law expressly provides that the application may be made in the county where a part of the section is situated.

The facts of this case do not, therefore, call for a further construction of the statute, and the judgment is affirmed.

*Affirmed*



## JOE LAKE ET AL. V. J. S. HOOD ET AL.

Decided February 27, 1904.

**Will—Entry of Judgment Nunc Pro Tunc—Compromise by Attorney.**

Application was made to probate a will by which the testator left his property "to the poor people of M.," and to have a trustee appointed to carry it into effect. The application was denied, and the mayor of M. then intervened and applied for a rehearing, which was also denied. Afterwards the city attorney, claiming to represent the mayor, and an attorney claiming to represent J. H. and the other heirs of the decedent, made a compromise agreement in the private office of the county judge by which certain notes belonging to the estate were set over to the mayor. The agreement was never entered up as the judgment of the court, nor any memorandum thereof entered on the docket. Later the mayor tendered into court the proceeds of the notes, asking that the compromise agreement be entered up as the judgment of the court and a trustee appointed to distribute the proceeds of the notes. The heirs resisted such appointment and asked that such proceeds be awarded to them. The mayor testified that he did not authorize the city attorney to make the compromise, and the testimony of the attorney who represented the heirs in making it showed only that he represented J. H., but what interest J. H. had in the estate did not appear. Held: (1) That the court properly refused to enter a nunc pro tunc judgment on the compromise agreement at a subsequent term of the court. (2) That no authority was shown for making the compromise agreement.

Error from the County Court of Harrison. Tried below before Hon. H. T. Lyttleton.

*Scott, Jones & Gardner*, for plaintiffs in error.

*F. H. Prendergast*, for defendants in error.

TALBOT, ASSOCIATE JUSTICE.—John Jones, alias John Hood, died in Harrison County, Texas, in April, 1900, leaving an estate of the estimated value of \$2400. S. P. Jones was appointed temporary administrator of his estate, and found among the deceased's papers an instrument wholly in the handwriting of deceased, as follows: "In case my death be sudden, I want everything above my funeral expenses given to the poor people of Marshall; this May 28, 1899. Jno. Jones." S. P. Jones, on the 26th day of April, 1900, filed an application to have said instrument probated as the last will and testament of John Jones and to have an administrator or trustee appointed to carry the provisions of said will into effect.

The defendants in error, being the heirs of said John Jones, alias Hood, contested the application to probate the will, and the probate thereof was refused. Joe Lake, plaintiff in error, was not a party to this contest, but on the 22d day of May, 1900, as mayor of the city of Marshall, filed a motion in the County Court for a new trial or rehearing of said application to probate the will, and also prayed for a writ of injunction restraining the parties in possession of the property belonging to Jones' estate from delivering it to his heirs. A temporary injunction was granted, but upon a hearing of the application for new trial the same was, on May 23, 1900, refused and the injunction dissolved. It is claimed that notice of appeal from this order was given, but the record



before us shows that no such notice appears in the minutes of the County Court.

After Lake's motion for a rehearing on the application of S. P. Jones to probate the will was overruled, Ben S. Pope, city attorney of Marshall, claiming to represent Joe Lake, as said city's mayor, and J. S. Hood, pretending to represent all the heirs of John Jones, alias John Hood, deceased, entered into an agreement and compromise of the litigation, by the terms of which the said Pope received for Joe Lake, as mayor of Marshall, for the benefit of the poor people of said city, seven promissory notes of \$100 each, belonging to the estate of the said Jones, deceased, and the remainder of the property was delivered to J. S. Hood. The terms of this compromise were incorporated into a judgment for the purpose of making it the judgment of the County Court, but it was never entered of record, and there is no memorandum on the judge's docket showing that any such judgment was ever rendered by him. The only evidence of such a judgment is the oral statements of witnesses that it was prepared and approved by the county judge in his private office. There is no evidence of any character that such judgment was rendered in open court.

On October 10, 1901, plaintiff in error, Mrs. R. M. Slater, made application to the County Court of Harrison County to be appointed trustee with authority to collect the notes turned over to Lake, by virtue of the compromise made with J. S. Hood; that her bond as such trustee be fixed, and that she be authorized to distribute the money derived from said notes among the poor people of Marshall.

On April 14, 1902, Joe Lake filed a petition in said County Court in which he recited the history of the litigation growing out of the efforts to probate the will of Jones; the agreement to compromise, and that he had collected the money due on said notes delivered to Pope, amounting to \$700. He further alleged that in pursuance of said agreement a judgment was prepared and agreed to by the parties and approved by the judge of the court, by which judgment the seven notes were adjudged to said Lake, to be collected and proceeds disposed of according to the provisions of the will, and the remainder of the property set aside to the heirs of the said John Jones, deceased. He also alleged that he declined to act as trustee for the purpose of distributing the money, and prayed that such trustee be appointed by the court, to whom he could deliver the money; that the compromise judgment referred to be entered nunc pro tunc, and that he be discharged with his costs. This petition was signed alone by attorneys and not sworn to. The heirs of John Jones, deceased, who are defendants in error here, appeared in the County Court and contested the entry of the judgment as prayed for in Lake's petition and the appointment of a trustee, and prayed that the money in Lake's hands be ordered delivered to them. They alleged, among other things, that no such agreement as that set up by plaintiffs in error was ever made with the heirs of the said John Jones, or with any person authorized by them to make such agreement. That there



was no such judgment or agreement as claimed by plaintiffs in error, and no memorandum thereof made by the Court.

It seems that the applications of plaintiffs in error were tried together by the court without a jury and resulted in a judgment refusing the appointment of a trustee, denying the entry of the judgment *nunc pro tunc* on the agreement of compromise, and Lake was ordered to deliver to defendants in error the money collected on said seven promissory notes. From this judgment of the court this writ of error is prosecuted. Mrs. R. M. Slater, however, by an instrument filed in this court, has abandoned the prosecution of the writ, and her right to have a trustee appointed as prayed for by her is not before us.

There was no appeal from the order of the County Court denying probate of the will of John Jones, deceased, and the correctness of the court's ruling in that respect is not before us. Some nice questions of law are suggested in counsel's briefs upon the subjects of charitable trusts and in whose name suit should be maintained for the appointment of a trustee, when, in such case, none is named; but inasmuch as the case will be affirmed upon other grounds, it becomes unnecessary to consider and discuss those questions.

As disclosed by the record the right of the poor people of Marshall to the money involved in this controversy, and of the plaintiffs in error to have a trustee appointed to receive and distributed the same among such people, depends upon their right to have enforced the agreement and compromise set up in the pleadings. Can this agreement be sustained and enforced against the defendants in error in view of the evidence contained in the record? We are of opinion it can not. If it be conceded that defendant in error, Joe Lake, as the highest municipal officer of the city of Marshall, had the right to maintain, for the benefit of the beneficiaries in Jones' will, a proceeding to have a trustee appointed to carry into effect the gift and trust created by said will, still it is believed he would not be authorized, at least without a judgment of the court, to compromise with those contesting the right of such beneficiaries to the gift, and accept less than the whole amount of the bequest. Besides, the evidence clearly shows that the agreement and compromise was not made by Lake, and that he never agreed to it. He testified: "I was mayor of Marshall in 1900, and was advised by S. P. Jones and Ben S. Pope that I should apply to have the will of John Jones probated. I agreed to do that. I was absent when the compromise was made and did not agree to it. I did not know it was made until some days afterward. I thought the city was entitled to all the money or none. As mayor of the city I presented the matter to the city council and they declined to have anything to do with the money. I have not taken any steps to set the agreement aside." The evidence does not show that Ben S. Pope had any authority to represent Lake and in his name and for the poor people of Marshall make the compromise relied upon. That his position as city attorney and as attorney of Lake, in endeavoring to get Jones' will probated, may have induced him to



believe that he was so authorized, is not questioned, but the evidence is wholly insufficient to warrant the conclusion that he was in fact authorized to act for, and, by his acts, bind Lake. That Lake refused to ratify his acts in effecting the compromise is placed beyond controversy by Lake's own testimony. Furthermore, there is an entire absence of testimony to show authority in either J. S. Hood or T. P. Young, as attorney, to make and bind the heirs of John Jones, other than J. S. Hood himself, by the compromise alleged. Ben S. Pope testified in substance that after the motion of Lake for a new trial was overruled and he had given notice of appeal, the heirs of John Hood, through J. S. Hood and their attorney, T. P. Young, came to his office and asked him if he would entertain a proposition to settle the litigation. He further stated in effect that after the settlement, J. S. Hood, representing the heirs of John Jones, remained in Marshall and collected the note turned over to him under the terms of the compromise. This is all that is shown by the record that can be construed to be evidence touching his authority to act for the heirs, and practically amounts to no evidence upon that question. What interest J. S. Hood had in the money held by Lake was not shown by the evidence, and hence the compromise could not be enforced as to such interest.

T. P. Young testified that he was attorney for J. S. Hood, and thinks he wrote the agreement. There is no evidence that he represented the other heirs even as an attorney, and if such relation had been established he would not thereby have been authorized to enter into the compromise sought to be enforced, without special authority to do so.

The court did not err in refusing to enter the judgment claimed to have been prepared, incorporating the terms of the compromise. Whatever action the judge took in the matter was not in open court, but in his private office. The judgment there agreed upon was never pronounced the judgment of the court, or, if so, there was no written memorandum of the same to be found upon the judge's docket evidencing the same, and without some such memorandum or other record evidence the judgment could not properly be entered after the adjournment of the court.

Plaintiff in error, Joe Lake, having failed to establish any right to have the compromise judgment entered, and showing no right in himself or the beneficiaries under Jones' will to the money alleged to be in his hands, the judgment of the court below is affirmed.

*Affirmed.*



## BERING MANUFACTURING COMPANY V. HENRY FEMELAT.

Decided February 29, 1904.

**1.—Charge—Referring Jury to Pleading.**

Failure of the trial court to inform the jury what were the issues of fact presented by the pleading may not, ordinarily, require a reversal of the judgment; but where the pleading is so complicated and technical as to render it doubtful whether the jury would clearly understand the issues presented, such failure to so inform the jury is reversible error.

**2.—Same—Personal Injury—Negligence—Weight of Evidence.**

A charge that "If you believe from the evidence that the plaintiff was injured at the time and in the manner substantially as charged and alleged in plaintiff's petition, you will find for the plaintiff," is held erroneous as on the weight of evidence, it not being established as a matter of law that the facts alleged in plaintiff's petition as to the manner in which plaintiff was injured constituted negligence on the part of defendant.

**3.—Negligence Per Se—Pleading.**

Only acts which are contrary to statute, or are so opposed to the dictates of prudence that reasonable minds can reach no other conclusion than that no person of ordinary care would commit them, are deemed in law negligence per se. See pleading setting up the circumstances attending the injury of a minor employed in a wood-working shop by getting his hand caught in a circular saw, held to present a case where negligence was a question of fact and it was not the law that he could recover if injured as stated.

**4.—Pleading—Minor—Cost of Medical Attention.**

In the absence of allegation and proof of facts which would render plaintiff, a minor, liable for the cost of medical attention furnished him; his parents being primarily responsible for such cost, he can not recover such expenses.

**5.—Master and Servant—Minor—Negligence—Charge.**

It was error to charge the jury to find for plaintiff if they believed from the evidence that plaintiff was young and inexperienced in working around moving machinery, and defendant, knowing his youth and inexperience, sent him into a place of danger without warning him of such danger, without requiring the jury to find that such acts constituted negligence on defendant's part and that appellee was not guilty of contributory negligence in obeying such orders.

**6.—Fellow Servant—Vice-Principal.**

A charge making the master responsible for injury to his servant "by the wrongful act of a fellow servant whom the employer had placed over and given superintendence of the work of the servant who was injured," was erroneous. Only those entrusted with power to employ or discharge are vice-principals.

**7.—Same—Command of Foreman.**

The master is responsible for the results of a command given by a foreman to one placed under his control, to the same extent as though the command were given by the master, irrespective of the foreman's power to employ or discharge.

Appeal from the District Court of Harris. Tried below before Hon. W. P. Hamblen.

*Baker, Botts, Baker & Lovett*, for appellant.

*A. C. Van Valzer*, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellee, who is a minor, brought this suit by his next friend to recover damages for personal injuries alleged to have been caused him by the negligence of the ap-



pellant. At the time he received the injuries complained of appellee was 18 years old and was in the employment of appellant as a common laborer in its planing and wood manufacturing mill. He began work in said mill on August 15, 1901, and continued in the performance of the duties of his employment until he was injured on September 27, 1901. On the last named date, while engaged in removing the sawdust and pieces of wood which had accumulated beneath a table or movable platform which was used to hold material that was being sawed with a circular saw, one of his hands was caught in the saw, and the thumb and three fingers of said hand were cut off. The petition alleges that at the time appellee was employed by appellant he had never worked in or around machinery, nor in a sawmill or wood factory, and that he so informed appellant's manager, Henry Bering, by whom he was employed; that appellee sought employment and was employed as a common laborer or helper in and about appellant's mill. "That thereafter, and during the continuance of said employment, the said Henry Bering directed plaintiff to assist one John Devore and to work under the direction and supervision of said Devore in such mill or factory as such common laborer or helper, and instructed plaintiff to obey the requirements and directions of said Devore at said work, he, the said Henry Bering, then and there well knowing that plaintiff was young, inexperienced in mechanical work and knew nothing of the dangers of work around machinery; defendant then and there gave the said Devore the control, direction and supervision of this plaintiff at said employment and around said mill or factory, and made, constituted and appointed the said Devore the agent and representative of defendant in the control and direction of plaintiff in said mill."

The circumstances under which appellee was injured as set out in the petition are in substance as follows:

"That on the 27th of September, 1901, the said Devore, as the agent of defendant, commanded said Henry Femelat to help him (Devore) to lower a table or platform, which platform was connected with a circular saw about thirty inches in diameter, and the said Devore then and there ordered plaintiff to clean away the sawdust, sticks and pieces of wood and refuse which had collected under said table, and which refuse prevented the lowering of the platform; that said command to perform the labor was given while said saw was in motion and revolving at a great rate of speed, and with great force, and that plaintiff unwillingly obeyed the command of Devore, in reliance upon the superior experience of Devore and in obedience to the directions given plaintiff at the time, believing that the saw was not in motion."

The negligence alleged in the petition consists in the general failure of appellant to inform and warn appellee of the dangers and hazards of working around a revolving circular saw, and especially in the failure of Devore to stop the saw before appellee was ordered to remove the sawdust, or to warn appellee that the saw was in motion and instruct



him how to remove the sawdust without coming in contact with the saw.

The appellant in its answer in the court below pleaded, (1) general demurrer; (2) general denial and plea of not guilty; (3) contributory negligence; (4) that plaintiff voluntarily went out of the line of his employment and placed himself in a position of increased hazard and danger; (5) that it was immaterial whether plaintiff had ever been warned of the fact that the circular saw was dangerous, because this fact was open and notorious and patent even to the simplest intelligence; (6) assumed risks; (7) that if plaintiff was injured because of the negligence of Devore, such negligence was that of a fellow servant; (8) that plaintiff had been duly warned with reference to his duties and the danger of coming too near the saw which caused his injury.

Appellee testified in substance that he was injured in the manner and under the circumstances alleged in his petition. He also testified that at the time he was employed he told Bering, appellant's manager, that he knew nothing about and had never worked around machinery; that he was employed as a helper for John Devore; that Bering placed him under Devore and told him to obey Devore in everything and do whatever Devore told him; that during all of the time he worked for appellant he worked with Devore and under his directions, except when Mr. Bering or Mr. King would come around and give him orders; that prior to the time he was injured he had never worked around the saw except to carry away the material after it had been run through the saw; that he had cleaned out from under the saw before, but had always used a shovel and had done the work when the saw was not in motion; that he thought the saw was stopped when in obedience to Devore's instruction to clean out the sawdust he put his hand under the table for that purpose and got it caught in the saw. On cross-examination he testified: "The smallest child would know it was dangerous to monkey with a buzz saw. I was hurt about 4:10 in the evening, and the saw had been constantly running since the noon hour. The saw is a very simple machine, as simple as I ever saw, and the first time I ever went there I knew it would be dangerous to monkey with it. The smallest child would know it would be dangerous to put their hand on it. I had worked there at the end of the table about forty days, and during all that time I had never cleaned off the frame of the saw before, nor helped clean it off. The sawdust had piled up underneath the table up to the saw."

There was testimony to the effect that when the buzz saw was revolving rapidly it was difficult to tell by looking at it whether it was in motion, and that other machinery in the mill made so much noise that the noise made by the revolving saw could scarcely be heard.

Devore testified: "The plaintiff worked with me from the middle of August to the latter part of September. It was his business to do the work of a helper. On the day he was hurt he had been working there all day at the saw, carrying material backward and forward. I



had run a piece of timber through the saw, and it did not cut quite deep enough. He was standing at the other end of the saw from me, and I raised the table and stooped down to knock off the dust on the end of the frame next to me, so that the table could be lowered a sufficient distance to enable the saw to cut deeper. I never told him to knock off the sawdust. It was only necessary to rake away the dust off the end next to me, because that was where it was accumulated. While I was stooping down, knocking off the dust, I heard the saw strike something, and his fingers dropped off at my feet. I raised up and he was standing there by the saw table holding his hand. I never said a word to him about cleaning off the saw or helping clean off, because it was not part of the work of a helper to clean off the sawdust during work hours. The saw was sometimes cleaned by the helper before it started up, but he would do this with a shovel and wheelbarrow. From where he reached his arm in beneath the saw table it was necessary for him to reach twenty-one or twenty-two inches in order to touch the saw. There was no necessity for his putting his hand in there as he did, as I always clean off the saw myself. When he first went to work there I told him what he was to do, and told him he was not to have anything to do with the saw; that I was to attend to that. The saw had been running a little over three hours since noon at the time he was hurt, and had not been stopped. I did not stop the saw when I stooped down to clean off the sawdust from the front end of the frame, as it was not necessary to have it stopped. The lever by which the saw is stopped is behind where I stand. The saw makes a buzzing noise when it is running, and when persons are standing near the saw frame they have no trouble to hear it running. Any person standing by the saw and looking at it can tell when it is in motion. I had told plaintiff that it was dangerous to get too near the saw, and he must not monkey with it. The saw is only exposed above and below the table, and in order to come in contact with it a person must reach across the table or across the frame underneath the table, at least twenty inches. It is in plain view all the time when the saw is in motion or when stationary, and every day that plaintiff worked there he worked in plain view of this saw. Mr. Bering is superintendent of the mill, and Mr. King is foreman."

There was other testimony corroborating the testimony of Devore that he did not order or request appellee to assist in cleaning away the sawdust, and also testimony to the effect that appellee was above the average boy of his age in point of intelligence, and that before he was employed by appellant he had worked for several months at a carriage factory in a building in which buzz saws and other machinery were in operation. There was also testimony to the effect that it could be easily determined by looking at a buzz saw whether or not it was in motion.

The trial court charged the jury as follows:

"Gentlemen of the Jury: The burden of proof is upon the plaintiff to make out his case by the preponderance of the testimony.

"If you believe from the evidence that the plaintiff was injured at



the time and in the manner substantially as charged and alleged in the plaintiff's petition, you will find for the plaintiff such an amount as will compensate him for his bodily pain and mental suffering by reason of such injury, and for cost of proper medical attention for his treatment, and for a sum sufficient to compensate him for his diminished ability to earn money after he becomes 21 years old.

"If you find that the plaintiff was not injured at the time and in the manner as charged in his petition, and was not injured as alleged, then you will find for defendant.

"You are charged that it is the duty of the plaintiff to use ordinary care in the performance of his duty, and of the employer to take proper precautions for the safety of the employes when working about machinery, especially when such person, through youth, inexperience or want of capacity may be unable to appreciate or avoid the danger to which he is exposed; therefore, if you believe from the evidence that plaintiff was employed to work about machinery, which was dangerous, and that defendant knew or should have known of the peril to which the plaintiff would be exposed, and did not give plaintiff reasonable notice of such danger, and he, without negligence on his part, through inexperience failed to perceive or understand the risk, and the plaintiff was injured, you will find for the plaintiff. Otherwise, find for the defendant, but the jury are charged that the fact that plaintiff was a minor does not relieve him from using ordinary care for his protection against risks incident to his employment. You are charged that ordinary care is such care that an ordinarily prudent person would exercise under the same or similar circumstances.

"The jury are the exclusive judges of the credibility of the witnesses and weight of the testimony; the law they will receive from the court."

Appellant's first assignment of error assails the second paragraph of the charge on the following grounds:

1. Because it was the duty of the court to evolve from the pleading the true issues of fact arising thereupon and submit such issues to the jury, and not leave the jury to decide for themselves what issues were presented by the pleading.

2. Because said charge was upon the weight of the evidence in that it in effect instructed the jury that the facts alleged in plaintiff's petition as to the manner in which he was injured constituted negligence per se.

3. Because it authorizes appellee, who is a minor, to recover medical expenses from appellant, when under the law such expenses were not chargeable to appellee but to his parents.

All of these objections are well taken. It may be that the failure of the trial court to inform the jury what were the issues of fact presented by the pleading would not require a reversal of the judgment, but the practice of referring the jury to the pleading to determine for themselves what are the issues presented has been uniformly condemned by our courts, and if the pleading in a case in which such charge is given is so involved and technical as to render it doubtful whether the



jury could clearly understand the issues presented a charge of this kind would require a reversal. *Bradshaw v. Mayfield*, 24 Texas, 482; *Barclay v. Tarrant County*, 53 Texas, 257; *Railway v. Scott*, 71 S. W. Rep., 36.

It was clearly error for the court to instruct the jury that the facts alleged in plaintiff's petition as to the manner in which he was injured established negligence on the part of appellant and we are satisfied the trial judge did not so intend, but such we think is the effect of the charge. The jury are told that "If they find that plaintiff was injured by defendant in the manner substantially as charged and alleged in the petition they must find for the plaintiff." The jury were not authorized to find for the plaintiff unless they found from the evidence that plaintiff's injury was directly caused by defendant's negligence and the above charge was manifestly erroneous, unless it can be said as a matter of law that the facts alleged in plaintiff's petition as to the manner in which the plaintiff was injured establish negligence on the part of the defendant.

The substance of the allegations of the petition as to the manner in which plaintiff was injured may be stated as follows: Plaintiff, who was 18 years old at the time of the injury, was directed by Devore to remove the sawdust from under a table connected with a circular saw which was in motion. He had never before worked about a circular saw, and did not know that this saw was in motion, and did not know the danger of working about machinery. The defendant knew of plaintiff's inexperience and failed to warn him of the dangers incident to his employment, and Devore failed to tell him that the saw was in motion at the time he ordered him to remove the sawdust and also failed to stop the saw or to instruct plaintiff how to remove the sawdust without coming in contact with the saw. In obedience to the order of Devore to remove the sawdust plaintiff put his hand under the table for that purpose and it was caught in the saw and four of his fingers cut off. Acts which are contrary to the statute, or are so opposed to the dictates of prudence that reasonable minds can reach no other conclusion than that no person of ordinary care would commit them, are deemed in law negligence per se. Unless the acts relied on to establish negligence in a particular case are acts of this character the question of negligence is one for the jury:

It certainly can not be contended that the failure of appellant to warn appellee of the danger of working around a circular saw, or the failure of Devore to stop the saw when he directed appellee to remove the sawdust, or to inform appellee that said saw was in motion, and direct him how to remove the sawdust without coming in contact with the saw, are acts which can be deemed negligence per se under the rule above laid down. These omissions of duty on the part of appellant and its agent Devore under the circumstances alleged in the petition only raise the issue of negligence on appellant's part and that question should have been submitted to the jury. *Railway Co. v. Murphy*, 46 Texas, 366;



Railway Co. v. Gasscamp, 69 Texas, 547; Baker v. Ashe, 80 Texas, 361; Willoughby v. Townsend, 45 S. W. Rep., 861.

Appellee being a minor his parents were primarily responsible for the cost of medical attention furnished him, and in the absence of allegation and proof of facts which would render him liable therefor he can not recover such expenses from the appellant. Bering Mfg. Co. v. Peterson, 67 S. W. Rep., 133.

We do not think the assignments which present the objections urged to the third and fourth paragraphs of the charge should be sustained, for the reason that said paragraphs contain no affirmative misstatement of the law and the omissions complained of could have been supplied by special charges.

Special instruction number 2 given at the request of plaintiff, and which is complained of in the fourth assignment of error, should not have been given, because it authorized the jury to find for the plaintiff if they believed from the evidence that plaintiff was young and inexperienced in working around moving machinery, and appellant, knowing his youth and inexperience, sent him into a place of danger without giving him warning or notice of such danger, without requiring the jury to find that the acts stated constituted negligence on appellant's part and that the appellee was not guilty of contributory negligence in obeying such orders.

The fifth special instruction given at the request of plaintiff was objectionable and should not have been given, for the reason that it also authorized a recovery by appellee regardless of the question of contributory negligence.

Special charge number 9 requested by the plaintiff should not have been given, because the abstract principles of law therein announced, if correct, are not applicable to the facts of this case.

The twenty-fourth special instruction given at the request of plaintiff instructs the jury that "An employer can not escape liability for an injury to a servant which was caused by the wrongful act of a fellow servant whom the employer has placed over and given superintendence of the work of the servant who was injured." This instruction was clearly erroneous and ought not to have been given. It is a settled rule of decision in this State that an employer is not liable for the negligent act of a foreman or boss by which a fellow servant is injured unless such foreman or boss had the power to employ or discharge his injured fellow servant. The rule may be an arbitrary one, but it has been uniformly recognized and enforced by our Supreme Court. Railway Co. v. Williams, 75 Texas, 7; Railway Co. v. Smith, 76 Texas, 618; Young v. Hahn, 6 Texas Ct. Rep., 107.

We do not understand, however, that this rule applies to an act of a foreman or boss which from its nature must necessarily be considered the act of the master.

We are of opinion that the act of Devore in ordering appellee to remove the sawdust must be deemed the act of appellant, and if such.



order was in fact given and was under the circumstances negligence, appellant would be liable for the proximate result of such negligence unless the appellee was guilty of contributory negligence in obeying the order. In all orders given by a foreman in reference to work under his supervision and control and given to those who have been placed by the master to work under him the foreman necessarily speaks for the master, and the doctrine of fellow servants does not release the master of liability for injury to a fellow workman of the foreman which is the proximate result of the negligence of the foreman in giving the order. *Railway Co. v. Fort*, 84 U. S., 554; *Lalor v. Railway Co.*, 52 Ill., 404.

It is the duty of an employe to obey the reasonable orders of his superior in regard to the work which he is employed to perform and about which the superior has authority to direct him, and unless the danger of compliance with an order thus given is so apparent that a person of ordinary prudence would not obey it the master is responsible for the result of the employe's obedience. *Railway Co. v. Kelly*, 8 Texas Ct. Rep., 703.

The evidence in this case shows that appellee was placed at work under Devore, and that the latter had the authority both express and implied to direct and control appellee in the performance of the duties of his employment. Under these facts it follows, as we have before said, that if Devore directed appellee to remove the sawdust, in giving such order he was the alter ego of the appellant and not the fellow servant of the appellee. If no such order was given and appellee voluntarily attempted to remove the sawdust while the saw was in motion the act of Devore in failing to stop the saw when he observed that appellee was engaged in removing the sawdust, if negligence, would be the negligence of a fellow servant for which appellant could not be held liable.

We shall not discuss in detail the various assignments of error which complain of the action of the trial court in refusing special instructions requested by the appellant. It is sufficient to say that appellant had the right to an affirmative presentation to the jury of each of the defenses relied on by it, and upon another trial proper charges presenting these defenses should be given. The defense of fellow servant, as we have before said, is only applicable to one phase of the case, and should not have been presented as in the charge requested by appellant.

The jury should have been instructed, as requested by appellant, that the fact that appellee was a minor did not relieve him of the duty to use that care and caution to prevent injury to himself which one of his age and intelligence would ordinarily use under similar circumstances.

Because of the errors in the charge before pointed out the judgment of the court below is reversed and the cause remanded.

*Reversed and remanded.*

Writ of error refused.



## W. A. WILKERSON ET AL. V. MRS. N. M. BACON.

Decided March 2, 1904.

**1.—Vendor's Lien—Limitation—Rescission.**

The right of a vendor retaining an express lien, when limitation is pleaded to a part only of the debt for purchase money on which he seeks foreclosure, is to rescind the entire sale, or not at all; he can not rescind as to the note barred and recover back its proportional interest in the land, while proceeding to enforce his lien as to the other purchase money notes.

**2.—Lien—Joint Obligors—Contribution.**

Where one of two joint obligors has discharged the debt on which both were bound, and with it the lien it held on property respectively bought by them, a court of equity may render a money judgment against the co-obligor for his proportion of the debt, and is not restricted to making it a charge against such co-obligor's part of the property.

Appeal from the District Court of Bell. Tried below before Hon. Jno. M. Furman.

*J. W. Moffett and W. S. Banks, for appellants.*

No briefs on file for appellee.

FISHER, CHIEF JUSTICE.—On January 3, 1903, Mrs. Bacon, the appellee, instituted this suit in the District Court of Bell County, to recover of and from the defendants amounts stated in four promissory notes for \$562.50 each, dated January 31, 1895 (one note was due January 1, 1899; one due January 1, 1900; one due January 1, 1901, and one due January 1, 1902), and to foreclose a vendor's lien upon lots 19 and 20, in block 23, in the city of Temple, Bell County, Texas, these lots having been conveyed by the plaintiff to Geo. E. Wilcox and Geo. A. Nelson. The notes in question were executed as a part of the purchase money for said land, and the deed which was then executed expressly retained a vendor's lien to secure the notes.

The appellants, with the exception of Mrs. Wilder, subsequently purchased the land from Wilcox and Nelson, and as a part of the consideration of this purchase, assumed the payment of the above notes.

The appellants pleaded the statutes of limitation to the note due January 1, 1899. Thereupon the plaintiff amended, and in the amended petition prayed to recover an undivided one-fourth interest in the land in controversy, in lieu of the amount represented by the note that was barred by limitation; and prayed for a moneyed judgment for the amount represented by the three remaining notes, and for a foreclosure of the vendor's lien upon the remaining undivided three-fourths interest in the land in controversy.

Among the defenses presented was a demurrer to the plaintiff's amended petition, on the ground that the plaintiff could not split up her cause of action, and thereby recover a part of the land represented by the barred note and also foreclose the lien on the remainder. In



other words, that the contract was entire and indivisible, and that the plaintiff's remedy was either an election to sue for the land or to foreclose the lien.

We are of the opinion that this demurrer should have been sustained. The contention of the appellants, as stated, is inferentially decided and supported by the decision of *Coddington v. Wells*, 59 Texas, 49, and *Gardener v. Griffith*, 93 Texas, 555; but the case directly in point, and which is decisive of the question, is *Nass v. Chadwick*, 70 Texas, 158.

In the case last cited, the plaintiff brought suit on three vendor's lien notes, and sought to recover a judgment for the amounts therein stated, with a foreclosure of the vendor's lien on the land described in the notes. A plea of limitation was interposed as to one of the notes. Thereupon the plaintiff, in an amended petition, undertook to recover so much of the land as was represented by the barred note, and to foreclose the vendor's lien upon the remaining quantity of land represented by the two notes that were not barred. The court held that the contract was entire and that the plaintiff was forced to an election of either the remedy to foreclose the vendor's lien on the unbarred notes, or to confine his action to a recovery of all of the land on the ground that the default in payment by the vendee authorized the vendor to regard the contract as rescinded, thereby entitling him to recover the land in question. A judgment in this case was rendered similar to the judgment in the case before us. In both instances the trial court rendered judgment permitting the plaintiffs to recover the quantity of land represented by the barred note, and foreclosed the vendor's lien on the remainder.

We find no error in the ruling of the court in the settlement of the controversy between the appellant Chattin and his coappellants, Wilkerson and Hollingsworth. They were liable to Chattin for the pro rata share due by them for the amount advanced and paid by Chattin in discharging their joint liability that arose under the notes in question. The rule of equitable contribution upon this subject is one of equality, and a court of equity has the power to render a moneyed judgment against joint obligors in favor of a co-obligor who advances and pays out money for their benefit in discharging a lien on the land which all are jointly liable for. If it appears to the court that granting relief of this character would operate as an equitable and equal adjustment of the matters between the co-obligors, we see no reason why it should be disturbed, solely upon the ground that a different relief might have been extended by the trial court creating a charge against the land in favor of the obligor who advances and pays money to discharge, either in whole or in part, a lien upon the same.

For the errors stated, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v.  
T. B. MOODY.

Decided March 2, 1904.

**1.—Injury to Passenger—Pleading.**

Allegations of the time, place and manner of receiving his injuries, by a passenger hurt by sudden jerking of train, held sufficiently definite as against a general demurrer.

**2.—Personal Injury—Evidence.**

Evidence of a plaintiff as to his conduct as affected by his injury—his subsequent work at his trade and desisting from same—held admissible.

**3.—Same—Exhibition of Injury.**

There was no error in permitting a plaintiff to exhibit an injured limb to the jury to show the extent of injury sustained.

**4.—Jury—Reading Authorities.**

It is within the discretion of the court to permit counsel to read extracts from legal authorities to the jury in argument, and ground for reversal only when such discretion appears to have been abused to the prejudice of the opposite party.

**5.—Charge—Degree of Proof.**

The difference between instructing a verdict for plaintiff if the jury find certain facts from a preponderance of evidence, and for defendant if they find certain facts, if prejudicial to the latter, held cured by a proper charge elsewhere on the defense of contributory negligence.

Appeal from the District Court of Bell. Tried below before Hon. Jno. M. Furman.

*T. S. Miller and Geo. W. Tyler*, for appellant.

*A. L. Curtis and Winbourne Pearce*, for appellee.

STREETMAN, ASSOCIATE JUSTICE.—Appellee recovered a judgment on account of personal injuries sustained by him while he was a passenger upon one of appellant's trains.

The first assignment of error complains that the court overruled a general demurrer to plaintiff's petition for the reason that the allegations as to negligence were too meager, indefinite and uncertain, and that the date of the accident was not alleged with sufficient certainty, and that the petition did not negative his contributory negligence.

The petition alleged that the accident occurred on or about the 6th day of February, 1903. It also alleged, among other things, that "plaintiff was aboard one of the passenger trains of the defendant as a passenger, traveling from said Waco, to said city of Temple, and that by reason of the carelessness and negligence of the defendant's employes engaged in the handling of said train, in stopping so suddenly, or jerking the car on which plaintiff was a passenger, plaintiff was violently thrown down and against the door of defendant's said car, or against the closet of said car, and thereby sustained permanent injuries," etc. These allegations were, in our opinion, sufficient as against a general exception.



The second assignment of error relates to the testimony of the plaintiff, in which he showed his conduct for some time subsequent to the date of the alleged injuries, testifying what length of time he worked at his blacksmith shop, and when he went home and why he did so, and showing the amount of pain and suffering sustained by him during that time. We can see no reason why it was not permissible for the plaintiff to testify to these facts as showing the effect of the injuries sustained by him.

The third and fourth assignments of error complain of the exhibition of the plaintiff's person to the jury during the time he was testifying as a witness, and to the fact that his counsel, in the presence of the jury, measured his right and left arms with a string, showing the difference in size of the two members.

The bills of exception do not show what was the difference, as shown by these measurements, nor do they show any features of this examination which were calculated to prejudice or unduly influence the jury. From the bills of exception we are unable to tell whether the result of this exhibition was favorable to the plaintiff or the defendant. Independent of this question, however, we are unable to see any impropriety in the exhibition of injuries of this character to the jury, in order that they may see for themselves the extent of the injury sustained. The present condition of the injured party in such cases is always one of the issues to be determined, and we see no reason why the jury should not, in a case of this character, be permitted for themselves to see the injured limbs, if the plaintiff is willing to exhibit them.

The fifth assignment of error is based upon a bill of exceptions taken to the reading by plaintiff's counsel in argument of an extract from Wood on Railroads. The reading of legal authorities in the presence of the jury rests to a large extent within the discretion of the court; and it is only in cases where we are able to say that that discretion has been abused, and that probable injury has resulted to the appellant therefrom, that we are warranted in reversing a case upon that ground. We are unable to say that there was any abuse of this discretion in this case.

A number of assignments are directed against the charge of the court, the complaint being that a different degree of proof was required with reference to the issues respectively of the plaintiff and the defendant, the court having charged the jury that if they found certain facts "from a preponderance of the evidence," to find for the plaintiff; and, on the other hand, if they should "find" certain facts, they would find for the defendant.

The complaint is that the jury were only required to find the issues upon which plaintiff relied for a recovery from a preponderance of the evidence, but that as to the defensive issues, they were required to find the theory of the defendant to be true. It is questionable whether the difference in instructing upon these respective issues is unfavorable to appellant, as contended; but if so, we think that any misapprehension



that might have been caused thereby was removed by the charge given by the court upon the burden of proof. The only defensive issue in the case was that of contributory negligence.

Among other charges the court gave the following: "In order for the plaintiff to recover in this case, the burden of proof is upon him to prove by a preponderance of the evidence that, first, he was injured as alleged; and, second, that such injury was the direct and proximate result of the negligence of the defendant, its agents or employes, and not occasioned or contributed to by any want of ordinary care on his part; and unless you so find from a preponderance of the evidence, you will find for the defendant."

It clearly appears from this charge that upon the sole defensive issue in the case, the jury were told, not only that said issue must be decided upon a preponderance of the evidence, but that the burden of proof as to this issue was upon the plaintiff. This, in our opinion, certainly obviated any possible objection to the other charges complained of.

It is earnestly insisted that the verdict of the jury is not sustained by the testimony, but a careful examination of the record convinces us this contention can not be sustained. The verdict of the jury is supported by the testimony of the plaintiff and three other witnesses to the accident. It is true that the testimony of the plaintiff is impeached by evidence as to his character and that there are some discrepancies between his statement and that of the other witnesses in the case. These matters, however, were peculiarly within the province of the jury and the trial court; and, in our opinion, there is abundant evidence in the record to sustain the verdict.

We have not deemed it necessary to discuss all of the assignments of error complaining of the charge of the court, but they have each received our careful consideration.

There being no error in the judgment, it is affirmed.

*Affirmed.*

Writ of error was refused by the Supreme Court April 28, 1904.



## COOPER GROCERY COMPANY ET AL. v. J. R. PETER.

Decided March 2, 1904.

**1.—Judgment—Injunction—Jurisdiction.**

In a county having two district courts, suit may be maintained in one to enjoin the sale, under execution issuing out of the other court, of land exempt as homestead; the statute (Rev. Stats., art. 2996) requiring injunctions to stay execution on a judgment to be tried in the court in which the judgment was rendered has no application.

**2.—Business Homestead—Sale of Business.**

A merchant who has sold out his stock and business and leased the building to another, can not sustain his claim to hold it exempt from execution as his business homestead by reason of his intention to resume business therein, when the evidence shows no present ability to resume nor reasonable expectation of being able to do so in the immediate future.

**3.—Business Homestead—Partial Occupancy.**

Evidence considered and held to support a claim of business homestead by one who, selling out a mercantile business and leasing his building to another, continued to occupy an office in it for the business of buying cotton and taking orders for clothing by sample.

Appeal from the District Court of McLennan. Tried below before Hon. Sam. R. Scott.

*Davis & Cocke*, for appellants.

No briefs for appellee.

**STREETMAN, ASSOCIATE JUSTICE.**—The Cooper Grocery Company and T. M. West having a judgment against appellee, J. R. Peter, in the District Court of the Nineteenth Judicial District of McLennan County, Texas, on March 14, 1903, caused an alias execution to issue under said judgment, which was levied on a portion of lot No. 12, in block 2, in the town of West, McLennan County, Texas. On July 30, 1903, another execution was issued and levied on said entire lot.

After the issuance of the first execution, appellee filed his petition in the Fifty-fourth District Court, of said county, and obtained a temporary injunction against the sale of said property, upon the ground that the same constituted his business homestead. Upon the trial of the case, the injunction against the sale of said property was perpetuated, and from this judgment said Cooper Grocery Company and West have appealed.

The first assignment of error questions the jurisdiction of the District Court of the Fifty-fourth District to determine the merits of the injunction because the judgment under which said executions were issued was a judgment of the Nineteenth District. Article 2996, Revised Statutes, provides: "Writs of injunction granted to stay proceedings in a suit or execution of a judgment shall be returnable to and tried in the court where such suit is pending, or such judgment was rendered." This suit, however, it not to stay any proceedings in said suit or to stay the execution on the judgment. The only relief



sought is an injunction against the sale of this particular property, and the injunction did not prevent the levy of the process upon other property which might have been subject to it. We are therefore of the opinion that the article of the statute cited did not apply, and that the District Court of the Fifty-fourth District had jurisdiction as in ordinary cases.

The other assignments of error complain of the insufficiency of the evidence to sustain the judgment of the court upon the issue of business homestead. The evidence of the plaintiff is that prior to June 6, 1902, he was engaged in the grocery business, and occupied the property in controversy for that purpose. On that date he sold out his stock of merchandise and rented the property in controversy to Chocek & Ku-sera, who thereafter used the property for a saloon and grocery store.

The evidence shows that the appellee refused to rent the property for a term of years, and rented it only by the month. There is also evidence to show that as a part of the rental contract he reserved the right to use the office and his desk situated in the house.

Appellee based his claim of business homestead, in part, upon the idea that he expected to resume the mercantile business in said house. We are of the opinion, however, that the evidence upon this phase of the case would not have sustained the judgment in favor of appellee. The record shows that he had no present ability to resume business, and does not indicate any reasonable expectation of being able to do so at any time in the immediate future; and if this were the only basis for the homestead claim, we believe that appellant should have had judgment under the authority of the case of *Shryock v. Latimer*, 57 Texas, 674.

It was further shown, however, that before the appellee sold his stock of merchandise he was engaged in the business of buying cotton, and also in the business of taking orders for tailor-made clothing; and he testifies that he continued to pursue these two lines of business after the sale of his merchandise, and that he used the property in question as his place of business for said purposes. The evidence shows that he kept his samples of clothing in this office, and that he also kept his books of account and other books necessary to the transaction of these two lines of business in his desk on said premises. His evidence tends to show that his business in each of these lines was very limited, especially during the season immediately preceding the levy of the execution; but we can not say that the evidence is in such condition as to warrant us in finding that the plaintiff was not actually engaged in this business, as he testified, and that he was not using the premises in question for that purpose.

It is also worthy of note that the evidence fails to show that the appellee had engaged in any other business. An effort was made by appellants to prove that he had engaged in other business, but the evi-



dence was such as to warrant the lower court in concluding that such was not the fact. The record upon the whole presents, in our opinion, simply a close question of fact upon this issue of business homestead, and is in such condition that do not feel authorized to disturb the finding of the lower court in favor of the appellee.

The judgment is therefore affirmed.

*Affirmed.*

Writ of error was refused by the Supreme Court April 28, 1904.



**RAILROAD COMMISSION OF TEXAS ET AL. v. ST. LOUIS SOUTH-  
WESTERN RAILWAY COMPANY OF TEXAS.**

Decided March 2, 1904.

**1.—Railway—Sidings and Spurs—Railroad Commission.**

The Act of March 27, 1903, requiring railroads to build sidings and spurs when ordered by the Railroad Commission, authorizes the commission to require such construction for public purposes only and free from discrimination in favor of any individual.

**2.—Same—Preference in Use.**

An order of the Railroad Commission requiring a railway company to lay a spur track to the premises of a lumber company, the latter furnishing a graded right of way therefor, to be used by the lumber company for loading and shipping carload freight, with right of the railway to use same for the business of other shippers if it could be done without inconvenience to the business of the lumber company, contemplated a construction of track with preference to the individual shipper contributing to build it, not one to be used by the public without discrimination, as required of common carriers by the Constitution (art. 10, sec. 2), and the Railroad Commission could be enjoined from enforcing such order.

Appeal from the District Court of Travis. Tried below before Hon. R. L. Penn.

*C. K. Bell*, Attorney-General, and *E. J. Mantooth*, for appellants.

*E. B. Perkins*, *H. B. Marsh*, and *S. R. Fisher*, for appellee.

**KEY, ASSOCIATE JUSTICE.**—The nature and result of this suit are correctly stated in the Attorney-General's brief, as follows:

"On the 12th day of August, 1903, the Railroad Commission of Texas made, promulgated and issued an order by which it directed that when the Angelina County Lumber Company had constructed a road-bed for a side track about 1000 feet long, running between the mill of said lumber company and appellee's right of way, and had furnished the ties ready for the laying of the iron thereon, as well as the right of way, free of cost to the appellee, that appellee should furnish the iron for said side track and lay the same, and should operate said side track for the receiving and discharging of all freight tendered to it for transportation to and from all points on said track.

"On the 2d day of September, 1903, the said Railroad Commission of Texas amended the aforesaid order, and by said amended order required the appellee to furnish, at its own cost and expense, the necessary material, including rails, switch fixtures, spikes, fastenings, etc., and the labor necessary to lay said side track, in accordance with a certain map or plat which had theretofore been filed with the commission, and requiring the Angelina County Lumber Company, at its own cost and expense, to do all of the grading required for said track, in such manner as might be directed by the appellee, and also to prepare grades in proper manner for laying track thereon, including drain boxes, bridges, cattle guards and road crossings. It further required the An-



gelina County Lumber Company to furnish all the land necessary for the right of way for said track, outside of such of the right of way as was on the land of appellee, free of all damages to adjacent or abutting property by reason of the construction and maintenance of said track, and the operation thereon of engines, trains and cars.

"Said order further required the said Angelina County Lumber Company, at its own cost and expense, to furnish all the cross-ties, switch-ties and bridge timbers required for the construction of said side track and which might be required for renewals or repairs thereafter. The materials furnished by the appellee were to remain its property.

"Said side track, when completed, was, by the order of said commission, to be used by the Angelina County Lumber Company for the purpose of loading and shipping carload freight, except that the appellee should have the right to use said track for its own purposes, or for the business of any other person or shippers, provided that the business of such other shippers could, in the judgment of appellee, be done on said track without serious detriment or inconvenience to the business of the Angelina County Lumber Company.

"Appellee was required to complete said side track for the use of the Angelina County Lumber Company by November 1, 1903, provided the said Angelina County Lumber Company should have completed said roadbed and furnished materials for the same within at least ten days before November 1, 1903, or thereafter the appellee should have ten days from the completion of said roadbed ready for track and materials furnished by the said Angelina County Lumber Company, in which to complete said side track ready for the use of the said Angelina County Lumber Company.

"A part of said side track would have been, if constructed, upon the right of way or land of the appellee, and a part of it upon the land of the Angelina County Lumber Company. The Angelina County Lumber Company complied with the order of the Railroad Commission, and procured for appellee the right of way over that part of the land which was not upon the appellee's right of way, and also complied with the other provisions of the order requiring it to grade and otherwise prepare the land for the appellee.

"Appellee thereupon demanded that the Angelina County Lumber Company should execute a contract by which it would agree, among other things, to indemnify the appellee for any damages which might result in the operation of its trains on the said siding, which the Angelina County Lumber Company refused to do. The appellee then refused to comply with the said order, or to construct said side track in accordance therewith.

"This suit was brought by the appellee in the District Court of Travis County against the Railroad Commission of Texas and the Angelina County Lumber Company, for the purpose of enjoining and restraining the Railroad Commission of Texas from enforcing or in any manner carrying out its said order requiring appellee to construct and build



said side track, and for the purpose of having said order found and decreed by the court to be unreasonable, unfair, unjust and unlawful, and canceled, set aside and held for naught.

"The trial was had before the court without a jury, and judgment was rendered in favor of the appellee, from which judgment an appeal was taken to this honorable court."

*Opinion.*—By an act of the Legislature, approved March 27, 1903, all railroads in this State are required to build sidings and spur tracks sufficient to handle the business tendered such roads, when ordered to do so by the Railroad Commission; and it is contended by the Attorney-General that the act referred to authorized the Railroad Commission to make and enforce the orders complained of and enjoined by the court below.

Counsel for appellees attack the validity of the act of the Legislature, and in addition thereto, contend that if the act be valid, a proper construction of it does not authorize the Railroad Commission to make and enforce the orders here complained of. Section 2 of article 10 of our State Constitution declares that "railroads heretofore constructed, or which may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers."

This clear and unambiguous provision of the fundamental law of the State fixes the status of railroads within the State, which status can not be changed by the Legislature, the Railroad Commission, or anyone else. This being the case, we think the act of the Legislature referred to should be construed as conferring power upon the Railroad Commission to require the construction of sidings and spur tracks for public uses only, and free from discrimination in favor of any particular individual.

Therefore, we hold that the Railroad Commission exceeded its authority when it undertook to compel the railroad company to construct a side track for the preferential use of the Angelina County Lumber Company, as stipulated in the sixth paragraph of the amended order.

Railroads are required by statute law of this State to ship freight in the order in which it is received, and are prohibited from making unreasonable discriminations between shippers; and we do not believe it was the intention of the Legislature in enacting the statute under which the Railroad Commission made the orders referred to, to authorize violations of existing laws prohibiting discriminations. Rev. Stats., art. 4537.

The main authority relied on by the Attorney-General is *Phillips v. Watson*, 63 Iowa, 28. That was a suit to enjoin certain condemnation proceedings, instituted by a mine owner, for the purpose of establishing a public way from a railroad to his coal mine, under a statute authorizing the establishment of such ways. The terms of the statute are not set out, nor is it clear from the case as reported that the statute conferred any preferential rights as to the use of the way. However,



it is stated in the opinion that if the purpose and effect of the statute were to confer on the mine owner the exclusive right to use the way, the court would not hesitate to hold that the statute could not be sustained; because, under such circumstances, the property, if condemned, would be applied to a private and not a public use. We think that case sustains our ruling in this case, and we quote from the opinion as follows:

"And we think that it makes no difference that the mine owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. And, where the use to which property is appropriated is a public use, the Legislature is the judge of the expediency of making the appropriation, and its action in making the appropriation can not be questioned in the courts. *Bankhead v. Brown*, 25 Iowa, 540, and cases there cited.

"We conclude, therefore, that a road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it, and that the mine-owner who procured it to be established must use the special privileges which the act confers on him, in such manner as not to destroy this right of the public, or prevent its enjoyment."

In that case the court held that the statute authorizing the condemnation proceedings made provision for *public way*, and that the mine owner must use the special privileges conferred on him *in such manner as not to prevent its use by the public in the way in which roads and highways are ordinarily used*. In other words, that decision and the Iowa statute recognize the right of the public as paramount to the right of the individual; while the order of the Railroad Commission under review in this case has reversed that principle, and has made the right of the public secondary and subservient to the right of the Angelina County Lumber Company, a private individual.

If the railroad company had complied with the order of the Railroad Commission, it might have rendered itself liable to prosecutions for unlawful discriminations; and if it had constructed the side track and disregarded the provisions of paragraph 6 of the commission's order, it might have been subjected to litigation on account of such disregard.

Hence we hold that the final order of the Railroad Commission is unjust, and being in excess of the authority of that body, the judgment restraining its enforcement should be affirmed and it is so ordered.

*Affirmed.*

Writ of error was refused by the Supreme Court April 28, 1904, in a written opinion reported in 98 Texas, —.



GULF, COLORADO & SANTA FE RAILWAY COMPANY v.  
P. L. ELMORE.

Decided March 2, 1904.

**1.—Fellow Servant—Brakeman and Station Porter.**

A brakeman on a train was not a fellow servant with the porter who unloaded freight at a station.

**2.—Same—Statutes Construed.**

Under the Acts of 1891, p. 25, sec. 2, and of 1893, p. 120, sec. 2, the respective grade of employment of two servants was determined by the power of superintendence or control; but by the Act of 1897 (Rev. Stats., art. 4560h) the rule is changed, and grade of employment must be determined by other considerations, as order of promotion, skill or compensation.

**3.—Same—Common Purpose—Query.**

Whether a porter unloading freight at a station, and a brakeman calling out the articles for the agent to check upon the way bills were working together to a common purpose questioned but not decided.

**4.—Contributory Negligence—Charge.**

Charge upon the burden of proof on contributory negligence held not misleading as inducing the jury to consider only the evidence thereon offered by defendant.

Appeal from the District Court of Bell. Tried below before Hon. Jno. M. Furman.

*J. W. Terry* and *A. H. Culwell*, for appellant.

*Puckett & Madison*, *A. L. Curtis*, and *Winbourne Pearce*, for appellee.

**STREETMAN, ASSOCIATE JUSTICE.**—Appellee recovered a judgment for \$1000 on account of personal injuries sustained in attempting to carry a half barrel of paint. He was a porter at the depot at Rogers, Texas, and among other duties, he was required to carry freight from the cars of the railway company into the depot or freight house. At the time he was injured he was engaged in unloading freight from one of the cars of a local freight train.

The theory of the plaintiff, which is sustained by the evidence in the record, is that it was the duty of the brakemen upon the train to bring such freight to the door of the car and call out the character of the freight; that it was then the duty and custom of the station agent having the waybills in his hands to see whether the freight was correctly announced by the brakeman, and if so, to check it upon the waybills, but if the freight was not correctly called out by the brakeman, that it was his custom and duty to immediately correct the mistake. A half barrel of oil weighed about 150 pounds, and appellee had previously carried half barrels of oil upon his back, and could have done so without accident or injury. The brakeman on this occasion brought to the door a half barrel, and called out that it was a half barrel of oil. The station agent who had the waybills in his hand, and had the means of correcting the mistake, did not do so; and the plaintiff, believing that the barrel con-



tained oil, undertook to carry the same upon his back, but the barrel in fact contained paint, and weighed over 300 pounds. The consequence was that the barrel being too heavy, the appellee was injured in attempting to carry it on his back, and the injuries sustained by him are shown to have been in the sum found by the jury.

There are many assignments of error relating to the sufficiency of the evidence to sustain the verdict. An examination of the record convinces us that there is evidence to sustain the theory of the plaintiff, as above set out, and to justify the jury in concluding that the injury resulted from the negligence, either of the station agent, who was shown to be a vice-principal, or from the concurring negligence of said station agent and the brakeman on said train, or from the negligence of the brakeman alone. Either of these theories would, in our opinion, have been sustained by the evidence in the case. The principal questions raised by the assignments of error are those involved in the charge of the court upon the question of fellow servants, and upon the burden of proof.

With reference to the question of fellow servants, the court gave the following instructions:

"3. You are further charged that all persons engaged in the service of a railway corporation operating a railroad, who are intrusted by such corporation with the authority of superintendence, control or command of other servants or employes of such corporation or with the authority to direct any other employe in the performance of any duty of such employe, are vice-principals of such corporation, and are not fellow servants with their coemployes.

"4. All persons who are engaged in the common service of such corporation, and who while so employed are in the same grade of employment and are doing the same character of work, or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. \* \* \*

"You are further charged that if you should find from the evidence that J. Novey was station agent for defendant at Rogers, and that by authority of defendant said J. Novey then and there had the superintendence and control of plaintiff as porter at said station, and was intrusted with the duty of directing his labor, and that plaintiff was bound to obey the orders of said Novey in the class, grade or kind of work for which he was employed, and upon which he was engaged at the time of the alleged injury, if any, then, if you so find, you are charged that said J. Novey was at such time and place a vice-principal of defendant, and if said Novey was guilty of negligence as charged at the date of the alleged injury which proximately caused the same, then the defendant would in law be guilty of negligence.

"You are further charged that if an employe is injured through the negligence of a fellow servant, as that term has been hereinbefore defined, then the master would not be liable, unless the master too was guilty of negligence proximately producing the injury. Now if you



find from the evidence that at the time and place, as charged, the plaintiff was an employe of defendant, and was then and there under the orders, direction, supervision and control of J. Novey as station agent, and that while so under the control of J. Novey and engaged in unloading a car under his direction, and in the regular discharge of the duties (for which he was employed) he attempted to carry into the freight house a certain barrel; and if you further find that said barrel was of a weight beyond the strength and ability of plaintiff to transport on his back, and if you further find said Novey knew, or by the exercise of ordinary care on his part would have known the weight thereof, and knew, or by the exercise of ordinary care would have known that in so undertaking to carry the same it would result in injury to plaintiff (if you find that it would have so resulted), and if you further find that plaintiff was ignorant of the danger of so attempting to carry said barrel, and used ordinary care in the effort to carry said barrel, and if you further find that under the direction of said Novey said plaintiff did then and there attempt to carry said barrel, but on account of the great weight thereof he was injured, as alleged, and that such injury was the direct and proximate result of negligence on the part of said J. Novey, then if you so find, you will find for plaintiff and assess his damages as hereinafter directed, unless you find for defendant under charges hereinafter directed.

"You are further charged that if said Novey was guilty of negligence, and if you should further find that E. S. Russell was a fellow servant of plaintiff, and that said Russell was also guilty of negligence which contributed to plaintiff's injury, then the fact, if it be a fact, that Russell was also negligent would not affect the defendant's liability on account of any negligence of said Novey which proximately resulted in plaintiff's injuries, if any, should you further find that plaintiff exercised ordinary care under the circumstances. \* \* \*

"Or, if you find from the evidence that plaintiff and said E. S. Russell were fellow servants, as that term has been hereinbefore defined, at the time of the injury to plaintiff, if any, and that said Russell represented to plaintiff that said barrel was of less weight than it really was, and thereby caused plaintiff to attempt to carry the same to his injury, and if you further find that such representations of Russell amounted to negligence on his part, but that the station agent, J. Novey, was not guilty of any negligence, then you are charged that plaintiff can not recover, and if you so find, you will find for defendant.

"In order to recover in this case the plaintiff must show by a preponderance of the evidence, first, that he was injured as alleged; second, that such injuries were the direct proximate result of the negligence of J. Novey, defendant's station agent at Rogers, or by the negligence of said Russell concurred in by said Novey, and unless the evidence by a preponderance thereof establishes said facts, you will find for defendant."

At the request of the plaintiff, the court also gave the following in-



structions: "You are charged that if you believe from the evidence that the brakeman was not in the same grade of employment with the plaintiff and was not engaged in the same character of work and in the same piece of work and was not working to a common purpose, then you will find that the said brakeman was not a fellow servant of the plaintiff, and if you further find that the said brakeman, either alone, or in connection with J. Novey, was guilty of negligence that was the proximate cause of the injury, if any, sustained by the plaintiff, then you will attribute said negligence to the defendant, and unless you find from the evidence that the plaintiff was guilty of contributory — as herein elsewhere defined, you will find for the plaintiff."

It is not entirely clear whether the court intended to submit to the jury as an issue of fact, whether the brakeman Russell was a fellow servant of appellee, or whether it was the intention of the court to instruct them, as a matter of law, that he was a fellow servant. The last paragraph of the court's general charge above set out, requiring the plaintiff to show that his injuries were the proximate result of the negligence either of the station agent alone, or of the concurring negligence of said station agent and the brakeman, would indicate that the trial court did regard the brakeman as a fellow servant. The other paragraphs of the charge quoted, however, submit this question to the jury as an issue of fact.

The appellant has no assignment complaining that these charges are contradictory or confusing. The complaint urged against the charge is that the court erred in submitting this question as an issue of fact to the jury, because the undisputed evidence showed that the brakeman and appellee were fellow servants.

We have reached the conclusion that if there was any error in submitting this issue to the jury, it was favorable to the appellant, for the reason that, in our opinion, the undisputed facts in the record showed that appellee and the brakeman were not fellow servants. The evidence taken as a whole establishes without contradiction that appellee was employed as a porter in the depot at Rogers; that he was under the control and direction of the station agent, and that his duties were such as would ordinarily devolve upon such an employe in attending to work around the depot, and in assisting in unloading freight from trains. The brakeman Russell was employed in a different department of the railroad; his principal duties were in connection with the running of freight trains; he was under the supervision and control of the conductor. The evidence does not show the wages that the brakeman was receiving, nor that his compensation was the same as that of appellee. Upon the whole it is clearly shown that these two employes were working in different departments; that their general duties were entirely distinct, and that they were not responsible to nor under control of the same vice-principal of the defendant.

The important question to be determined is whether under these facts they can be said to have been in the same grade of employment.





At common law they would have been held to be fellow servants, and also under the definition of fellow servants in the Acts of 1891 and 1893. These acts are as follows:

"All persons who are engaged in the common service of such railway corporations, and who, while so engaged are working together at the same time and place to a common purpose, of same grade *neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employes*, are fellow servants with each other; provided that nothing herein contained shall be so construed as to make employes of such corporation in the service of such corporation fellow servants with other employes of such corporation, engaged in any other department or service of such corporation. Employes who do not come within the provisions of this section shall not be considered fellow servants." Acts 1891, p. 25, sec. 2.

"All persons who are engaged in the common service of such railway corporation, receiver, manager or person in control thereof, and who, while so employed, are in the same grade of employment and are working together at the same time and place, and to a common purpose, *neither of such persons being intrusted by such corporation, receiver, manager or person in control thereof, with any superintendence or control over their fellow employes, or with the authority to direct any other employe in the performance of any duty of such employe*, are fellow servants with each other; provided that nothing herein contained shall be so construed as to make employes of such corporation, receiver, manager or person in control thereof, fellow servants with other employes engaged in any other department or service of such corporation, receiver, manager or person in control thereof. Employes who do not come within the provisions of this section shall not be considered fellow servants." Acts 1893, p. 120, sec. 2.

The definitions above given were construed by our Supreme Court in the cases of Texas C. Ry. Co. v. Frazier, 90 Texas, 33, 36 S. W. Rep., 432, and Gulf C. & S. F. Ry. Co. v. Warner, 89 Texas, 475, 35 S. W. Rep., 364; and the effect of these decisions is that the requisites necessary to constitute employes fellow servants, as prescribed in each of the acts, are limited by the clauses in italics.

In the case of Railway Co. v. Warner, Judge Denman says: "In the absence of a statutory test, the grade would have depended upon the test which might have been adopted by the courts, such as authority one over the other, order of promotion, skill in the service, compensation received, etc. We are of the opinion that the Legislature anticipated and settled this difficulty in the construction of the word 'grade,' by the use of the clause 'neither of such persons being intrusted,' etc., 'with any superintendence or control over their fellow employes,' etc., as explanatory of what was meant by the clause 'in the same grade.'" And because of this limitation, which occurs in each of the definitions above set out, it was held that employes who were engaged in the common service, etc., and were not shown to have been intrusted with any



superintendence or control over their fellow employes, were fellow servants. In the case mentioned, an engineer and a switchman were held to be fellow servants.

In *Railway Co. v. Frazier*, 90 Texas, 33, 36 S. W. Rep., 432, a brakeman and engineer were held to be fellow servants.

After these decisions, in 1897, the acts in question were amended and the definition there given is as follows:

“Art. 4560h. Who are fellow servants: All persons who are engaged in the common service of such person, receiver or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employes who do not come within the provisions of this article shall not be considered fellow servants.”

It will be noted that one of the principal changes effected by this amendment was the omission of the clauses in the previous legislation which were held to constitute a limitation upon the words “grade of employment.”

In view of the previous legislation and the decisions thereunder, it seems to us that the purpose of the Legislature was to get rid of the construction which had been placed upon these statutes in the cases above cited, and to broaden the definition of a fellow servant. It therefore becomes our duty to construe the language used in this Act of 1897, and to determine whether the appellee and the brakeman Russell were shown to be in the same grade of employment; and, to our minds, the evidence was entirely insufficient to establish this fact. As said by Judge Denman: “In the absence of a statutory test, the court might have adopted as a test the authority of one over the other, the order of promotion, skill in the service, compensation received, etc.” By the amendments to which we have referred, we think it was clearly the purpose of the Legislature that the authority of one over another was not to be the test; and if that be true, then none of the other conditions were shown to exist in this case which would constitute these employes in the same grade of employment. The evidence does not show that their compensation was the same; the evidence does not show that their right to promotion was the same. It does affirmatively show that their principal duties were entirely different, and that they were employed in entirely different departments of the railway service.

We therefore conclude that in the absence of the limitation placed upon the words under the former legislation and decisions of our Supreme Court, we must hold that these parties were not shown to have been in the same grade of employment.

It is further insisted by appellee that the evidence shows that they were not “working together at the same time and place and at the same piece of work and to a common purpose;” it being contended that while they were engaged in the general task of unloading this freight, that the



brakeman's duty concerning it had ceased when he brought it to the door and called out the character of the freight, and that at that time the duty of appellee had just begun. In view of our conclusion upon the question above discussed, however, it is unnecessary to express any opinion upon this question.

Having reached the conclusion that the evidence wholly failed to show that the brakeman and appellee were fellow servants, it follows that the court would have been authorized in instructing the jury peremptorily to this effect; and if the charge of the court is to be construed as submitting this as an issue of fact to the jury, it is in that respect only a more favorable instruction than appellant was entitled to.

With reference to the burden of proof, the court gave the following instructions: "The burden is upon the servant to show negligence on the part of the master and due care on his own. \* \* \* You are further charged that where the plaintiff seeks to recover damages on account of the alleged negligence of the defendant, it devolves upon him to establish the facts upon which he relies by a preponderance of the evidence; and where the defendant relies upon contributory negligence upon the part of the plaintiff to defeat the action, it devolves upon him to establish the same by like preponderance of the evidence in the case."

These two paragraphs occur in different portions of the court's charge, and it may be that they are conflicting, but there is no assignment of error complaining of the charge in that respect. The only complaint made is of the last section above set out, for the reason that the charge was calculated to and possibly did lead the jury to believe that they were not to consider the evidence offered by the plaintiff in determining the issue of contributory negligence.

Notwithstanding the admission in the brief of appellee that this probably constitutes reversible error, we do not believe that the case should be reversed for this reason. The charge, in our opinion, comes within the rule announced by the Supreme Court in the case of Gulf C. & S. F. Ry. Co. v. Howard, 7 Texas Ct. Rep., 574. Answering a question certified by this court in that case, the Supreme Court says: "The charge of the court on the burden of proof of contributory negligence, when taken in connection with the charge set out in this certificate, was not calculated to mislead the jury. The fourth clause of the charge given by the court embraced two acts alleged by defendant to have been negligently done by the deceased that contributed proximately to his death. The court charged the jury that if they found from a preponderance of the evidence that either of said acts had been done by the deceased, and that he was guilty of negligence as defined in the charge, then they would find for the defendant. To obey this charge in determining the question of contributory negligence, the jury must necessarily have considered all of the testimony introduced upon the subject of contributory negligence by both the plaintiffs and defendant, for in



no other way could the preponderance of the testimony upon that issue be determined."

In this case the jury are simply told that it devolves upon the defendant to establish contributory negligence by a "preponderance of the evidence in the case." Not only are they to look to the preponderance of the evidence which, as stated by the Supreme Court in the case above cited, would necessarily involve a consideration of all the evidence, but they are told that this must be a preponderance of the evidence "in the case." And we think it clear from this that the jury would not infer that they would only look to the evidence of the defendant upon that issue.

Appellee has filed a cross-assignment of error, complaining of the insufficiency of the amount awarded by the verdict. We are unable to say from the evidence that the amount awarded was not full compensation for the injuries sustained.

The other assignments have been carefully considered, and while we do not deem it necessary to discuss them, we have found no reversible error in the record. The judgment is therefore affirmed.

*Affirmed.*

#### OPINION ON REHEARING.

**STREETMAN, ASSOCIATE JUSTICE.**—In appellant's motion for rehearing it is insisted that the finding of this court in the original opinion that appellee and the brakeman Russell were not fellow servants, and the statements made in the opinion in reference to the facts upon said issue are not supported by the evidence, and we are requested to file additional findings of fact with reference to said issue.

We have carefully re-examined the evidence in the record bearing upon this question, and are satisfied that the statements in the original opinion are supported by the evidence in the record. In order, however, that appellant may have the benefit of the testimony as it is shown in the record, we find that upon this issue the witnesses testified as follows. Appellee testified:

"My duties in my employment at Rogers were to check baggage, unload baggage, etc., and unload freight from the cars and assist around in nearly everything Mr. Novey, the agent, told me to do. Mr. Novey is the station agent at Rogers, and I worked under his direction and control, and he had general direction and control of nearly everything I did there. I was the only assistance there besides himself." He further testified: "It was the duty of the brakeman when a car was to be unloaded to bring freight up to the car door; that is, he takes it from its position in the car to the door, and it is my duty to take it the rest of the way or to the freight house. We were both engaged in unloading freight. It is one continuous act from the time he gets hold of it until I set it over on the depot platform. It takes all that to be done before the freight is unloaded. The brakeman was performing his regular duties in setting the freight up to the car door. He was employed to do that. There was nothing new or strange about



it. I was employed, too, and it was a part of my regular duties to take the freight from the car door over the depot platform. \* \* \* After the brakeman would bring a piece of freight up to the car door, and call out what it was for, he would have nothing more to do with it. He did not help me to carry the freight from the car door to the freight house. That was my work. That is, my work began where his ceased."

J. Novey, the station agent, testified: "Elmore and I were good friends, and he was working under me there as porter."

The brakeman, Russell, testified as follows: "It was Mr. Novey's business to stand there and check the freight, and that is what he was doing at the time, as usual. He would check the freight out as I brought it to the door, and as Elmore carried it in. My position was that of brakeman at that time. Mr. Novey was station agent and Elmore was porter there at the depot. I suppose I might be considered as working in one department and him in the other. I was working under the conductor of the train, and I suppose Mr. Elmore was working under Mr. Novey at the station. The car that we were unloading out of was standing on the main line. We left one car there and unloaded some freight out of it before we left."

Redirect examination: "Mr. Novey could direct me what to do while we were unloading that freight and how to do that, but when we are out on a run I am under the conductor. The conductor of the train did not have anything to do with the unloading of that freight. He was not there at that time. We got to Rogers that morning about 10 o'clock and left about 11 o'clock, as well as I can remember. While we were unloading this freight, both myself and Mr. Elmore were temporarily working under Mr. Novey's direction."

The motion for rehearing is overruled.

*Motion overruled.*

Opinion filed March 30, 1904.

Writ of error was refused by the Supreme Court April 20, 1904.



## FORT GRAIN COMPANY v. HUBBY &amp; GORMAN.

Decided March 2, 1904.

**Sale—Shortage—Kansas City Weights.**

A contract for purchase and shipment of corn, to be paid for by the buyer at a named rate per bushel, with the stipulation that it was sold "on Kansas City weights and grades," was ambiguous, and evidence was admissible to show that such stipulation was intended to relieve the seller from loss by waste and shrinkage in shipment, but not from fraud or gross mistake in the Kansas City weights.

Appeal from the County Court of McLennan. Tried below before Hon. G. B. Gerald.

*Davis & Cocke*, for appellant.

*A. C. Prendergast*, for appellee.

**KEY, ASSOCIATE JUSTICE.**—Appellees recovered judgment against appellant for \$138.15, on account of a shortage in a car of corn sold by appellant to appellees. It was stipulated in the contract that the corn was sold "on Kansas City weights and grades," and the only point presented in the appeal is appellant's contention that the stipulation referred to relieved them from liability for the shortage.

By the terms of the contract, appellees were not to pay for the corn in bulk, but were to pay for it at the rate of 71 cents per bushel. Before discovering the shortage they paid for it according to the weight stated in the bill of lading at Kansas City, where appellant purchased the corn.

Appellees offered testimony tending to show that the stipulation in the contract, "on Kansas City weights and grades," meant that the purchaser was to bear whatever loss might result from waste or shrinkage while the corn was being shipped from Kansas City, Mo., to Waco, Texas, but not a loss resulting from fraud or gross mistake in weighing the corn at Kansas City. On the contrary, appellant submitted testimony tending to show that the stipulation referred to was intended to relieve the seller from all liability or loss resulting from incorrect weights or grades. On that point the testimony was sharply in conflict, but that submitted by the appellees supports the finding of the court in their favor.

In our opinion, the stipulation in the contract, "on Kansas City weights and grades," was ambiguous, and it was proper for the court to hear testimony tending to explain its meaning. Appellees submitted testimony showing a shortage far in excess of ordinary shrinkage, and also showing that the seal of the car had not been broken, and that there was no waste in transit. This testimony, in connection with the testimony sustaining their construction of the contract, entitled appellees to recover.

No error has been pointed out, and the judgment is affirmed.

*Affirmed.*



CENTRAL TEXAS & NORTHWESTERN RAILWAY COMPANY v.  
C. W. GIBSON.

Decided March 2, 1904.

**1.—Charge—Assignment of Error—Proposition.**

An objection to a charge that it "is reversible error" is too general a proposition to merit consideration.

**2.—Railway—Dangerous Crossing—Duty to Keep Flagman.**

It was not improper to charge the jury to find for plaintiff if the evidence established negligence in failing to keep a flagman at a crossing and they believed that it was peculiarly a dangerous one and that a person of ordinary caution would, under the circumstances, have kept a flagman there, where it appears from the circumstances, though not by direct testimony, that the crossing was extra hazardous, which the evidence here considered is held sufficient to show.

**3.—Charge—Assuming Facts.**

One can not complain of a charge where it is apparent that he is not injured thereby, as where it only assumes uncontroverted facts.

**4.—Discovered Peril—Contributory Negligence.**

A railway company is liable where its employes discover the perilous situation of a person in going upon its track and by warning could have prevented injuring him, though such a person is guilty of contributory negligence in going upon the track. Evidence considered and held to present this issue.

**5.—Public Crossing—Duty to Keep Flagman.**

At a public crossing in a city it should be presumed that persons may be approaching at any time, and care should be taken to warn them of approaching cars whether such persons are discovered or not.

**6.—Excessive Verdict—Remittitur.**

Verdict of \$1000 for slight personal injury considered excessive and a remittitur of \$750 required as a condition of affirming the judgment.

Appeal from the District Court of Ellis. Tried below before Hon. J. E. Dillard.

*Baker, Botts, Baker & Lovett and Frost & Neblett, for appellant.*

*G. C. Groce and Templeton & Harding, for appellee.*

FLY, ASSOCIATE JUSTICE.—Appellee was injured in a collision between a car, to which no engine was attached, and his vehicle, on a street crossing in the city of Waxahachie, and sued appellant to recover damages alleged to have been sustained to his surrey, his horse and his person. He recovered the sum of \$1225.

The collision occurred through the negligence of appellant. The car had been shunted by an engine down the track to a street crossing and ran into and crushed the vehicle of appellee and damaged one of his horses and injured his person. The car was running across a street, with no one in charge, according to appellee's witnesses, in violation of an ordinance of the city of Waxahachie, and no signal or warning of its approach was given. Appellant's witnesses testified that a brakeman was in charge of the car, and if so the facts justify the conclusion that he discovered the peril of appellee and by proper effort could have



prevented the collision. The brakeman made no effort to warn appellee of the approach of the car. The facts are discussed in connection with the assignments of error.

The court charged the jury that if they believed that the crossing on which the injuries occurred was peculiarly dangerous and "that a person of ordinary caution and prudence would, under all the circumstances, have kept a flagman at such crossing to prevent injury there to travelers passing over the same," and if the jury believed that appellant failing to keep a flagman at the crossing was negligence, and the injury resulted from such failure, they should find for appellee. The charge is complained of in the first assignment of error, the grounds of complaint as set out in two propositions being, first, that such charge "is reversible error," and second, that "in the absence of affirmative proof that the crossing in question was exceptionally dangerous to persons attempting to pass over it," it was error to give the charge. It is clear that the first proposition is too general to merit consideration, and the second we think is based upon a false premise, as appears from our conclusions of fact.

We think this matter is settled adversely to appellant in the case of *Missouri K. & T. Ry. Co. v. Magee*, 92 Texas, 616, where a similar charge is upheld, where similar objections were urged to it to those insisted on in this case. The court said: "The facts of this case show that the crossing at which the injury occurred was in a populous city, on one of the principal streets, and at a point so near to a bridge crossing the bayou as to render it more than usually hazardous. The evidence justified the court in submitting to the jury the question whether the circumstances were such as to require from the railroad the precaution to provide some person to notify travelers of the approach of trains; the charge is in harmony with the general principles which govern the liability and prescribe the duties of railroad companies." As said in that case, such a charge would not be applicable unless it appeared that the crossing where the injury was inflicted was extra hazardous, and this is true because the law does not require railroad companies to keep flagmen at all railroad crossings, and liability could arise from the failure to keep a flagman at a crossing because of the circumstances making it an exception to the ordinary crossing. We think the evidence was sufficient to show that the crossing was one exceptionally dangerous.

The city of Waxahachie has about six thousand inhabitants and the crossing under consideration was in a thickly settled portion of it, and on one of its most frequented and most populous streets about 1000 feet from the public square. On the side from which appellee approached the crossing there are trees obstructing the view of the railroad track on the side of the street from which the car approached until a point twenty or twenty-five feet from the track is reached, and on the opposite side of the crossing the same side of the street the view of the track is obstructed until within thirty feet of the track. A view of the track



on the other side of the street was also obstructed until a point within twenty-five feet of the track is reached. E. P. Littlepage, a witness for appellant, stated that he had been working near the crossing for about eight months, and that when he heard the sounds of voices it impressed him that something exciting was about to take place. "I had seen some narrow escapes at that crossing before and knew pretty well what it was." He afterwards stated that he had seen three or four such escapes.

The argument that juries would be inclined to find that a flagman should be placed at any crossing where an accident occurred, whether it was shown to be dangerous or not, if at all justified by observation and experience, could be used with equal cogency and effect in regard to any question of fact, and is an arraignment of the jury system rather than an attack upon the propriety of the charge. There is no cogency in the argument, for should a jury be so prejudiced or ignorant as to find against the facts in regard to the danger at a certain crossing, it must be presumed that the trial judge would set aside the verdict, and in the event that he failed to do so the appellate tribunals would see that no injustice was perpetrated. It stands in the category of other matters of fact which under our system of government have been confided to the determination of men selected from the vicinage, and which system the wisdom and experience of centuries have demonstrated to be the one in which justice is more nearly attained than in any other known to the world.

While the eighth paragraph of the charge is not a model of rhetorical perspicuity, we do not think it is so incoherent and complicated, as contended by appellant, as to confuse or mislead a jury composed of men of average intelligence.

In the first proposition under the third assignment of error appellant attacks a paragraph of the charge because it submitted to the jury an issue as to whether there was a collision between the car and vehicle when the uncontroverted evidence showed there was a collision. How that injured appellant it does not state, and it is apparent that no possible injury could have resulted. The second proposition states that it "is erroneous, in that the evidence adduced on the trial did not justify or authorize the issue involved in the charge." At least two issues are presented by the charge, namely whether there was a collision and whether the employes of appellant saw the peril of appellee in time to have warned him and prevented the collision. To which one reference is made is left in doubt. However, there was a collision and there is evidence tending to show that it might have been prevented if proper warnings had been given. The third proposition is without merit. The defenses were all presented and there is nothing that indicates that the trial judge was not fair and impartial in the trial of the case.

The eleventh paragraph of the charge is not open to the criticism that it rendered wholly ineffectual appellant's plea of contributory negligence. If appellant's employes saw that appellee was going into a place



of peril in front of the car, and could by a warning have prevented it, the railroad company would be liable, no matter if appellee was guilty of negligence in going upon the track. The doctrine of discovered peril was clearly raised by the evidence. *San Antonio Traction Co. v. Courts* (Texas Civ. App.), 71 S. W. Rep., 777, and authorities cited; *Bunyan v. Railway (Mo.)*, 29 S. W. Rep., 842.

The railway company was operating its cars across a much traveled street in a city, and it is not the law, as stated in a special charge requested by appellant, that no duty rested upon appellant to discover the peril of any one approaching the crossing. The railway owed it to the public to keep a vigilant lookout for those on and approaching the crossing and to warn them of the danger, and the negligence of the party upon or approaching the track would not relieve the railway company of liability for damages resulting from negligence. In this case a car, with no one upon it, was running across a populous street, no signal was given, and a vehicle was crashed into and some of its occupants injured. It was negligence to fail to give notice of the approach of the car to those who might be in proximity to the crossing. As said in *Railway v. Crosnae*, 72 Texas, 79, we can not assent to the proposition that persons near a crossing are entitled to no care for their safety from the railway company unless the danger is seen. It should be presumed that persons may be approaching a public crossing at any time and care should be taken to warn them of approaching cars. *Missouri K. & T. Ry. Co. v. Magee*, 92 Texas, 616.

The evidence is clear that appellee was seen by employees of appellant driving toward the crossing with the evident intention of going upon the same, and while the employees swore that they did what they could to warn appellee, their evidence was flatly contradicted by the witnesses for appellee. The jury was justified in finding that appellant's employees discovered the peril of appellee, but used no adequate means to warn him and prevent the disaster. Appellee had no notice whatever that the car was approaching the crossing, although he had stopped, looked and listened before entering upon the crossing. He had the right to rely upon appellant giving him warning of the approaching car, and the jury could properly find that he was not guilty of negligence in going upon the crossing. These findings dispose of the sixth assignment of error.

The sixth and ninth special charges requested were properly refused because they were based upon the premise that the employees of appellant did not know that appellee was going upon the track until he drove thereon, when the employees themselves swore that they saw the vehicle before it reached the crossing and signaled to appellee of the danger. According to the testimony of Owen Johnson he was on top of the car, as a brakeman, and saw the horses attached to appellee's vehicle when they were seventy or eighty feet from the crossing and began putting on the brakes, but the car did not stop until it had gone twenty-five or thirty feet past the crossing. The conductor swore that a car could be



stopped in ten to twenty-five feet and the brakeman that it could be stopped in from seventy to 105 feet. Other employes testified that they saw appellee approaching the crossing and signaled to him to stop when he was 150 or 200 feet distant.

The seventh and fourteenth special charges were upon the weight of the evidence, and were properly refused. They assumed that the warnings claimed to have been given were sufficient and denied the right of the jury to find that other signals should have been given.

The eighth, sixteenth, seventeenth, eighteenth, twenty-second and twenty-third special charges were properly refused because they ignored the issue of discovered peril, and absolved appellant from all liability if appellee negligently went on the crossing. The twelfth and thirteenth special charges were fully covered by the charge of the court and were properly refused.

In this case, though the issues were few and simple, twenty-three special instructions, reiterating matters that could have been embodied in two or three instructions, were requested, and their presence has added much to a brief of 120 pages filed in this court. The method adopted tends to confusion in the trial court and entails a vast amount of unnecessary labor upon the appellate court.

Appellee testified that the only injury he received was a cut above the eye, and that it was painful. He said he did not lose any great length of time, and the wound healed in about a week. He did not go to bed from it and received no permanent injury. The doctor took some stitches in the cut, but it was not shown that he charged or was paid any fee. It is evident that the wound was of a trivial nature, and we think a verdict of a thousand dollars as damages resulting from such a wound is excessive. The sum of \$250 will compensate appellee for all damages resulting from his personal injuries.

If a remittitur of \$750 is entered in ten days from the filing of this opinion, the judgment will be affirmed, but if not it will be reversed and the cause remanded.

*Affirmed on remittitur.*



## MEYER BROS. DRUG COMPANY ET AL. v. B. L. DURHAM ET AL.

Decided March 3, 1904.

**1.—Sale—Fraud on Creditors.**

Evidence considered and held not to show conclusively that a sale for value of his entire stock of goods, by one who was at the time insolvent, was in fraud of creditors, but to require submission of that issue to the jury.

**2.—Insolvent—Sale of Goods—Fraud of Creditors—Intent.**

The fact that one buying from an insolvent has notice of such insolvency and pays cash for a stock of goods without seeing that the money is applied to creditors, does not, of itself, render the sale fraudulent; notice of intent to defraud creditors is necessary.

**3.—Charge as a Whole—Contradictory Paragraphs.**

Inconsistent paragraphs in a charge are not ground for reversal where the charge, when read as a whole, does not leave the jury in doubt.

Error to the District Court of Johnson. Tried below before Hon. W. Poindexter.

*W. R. Walker and McCormick & Spence*, for plaintiffs in error.

*D. W. Odell and S. C. Padelford*, for defendants in error.

**JAMES, CHIEF JUSTICE.**—The question involved was whether or not a sale of a stock of goods by Overton & Sons to B. L. Durham was fraudulent as to creditors.

The first assignment of error is that the court erred in submitting the issue of fraudulent sale, the testimony conclusively showing that it was such. The second is that the court erred in refusing to set aside the verdict in favor of defendant, for the same reason. The tenth is that the verdict should have been set aside as against the great preponderance of the evidence.

In view of the verdict we conclude that the evidence was not such as would have warranted the trial judge in withholding that issue from the jury.

There was evidence of the following facts: That Overton & Sons were insolvent; that they had practically no other property than that which figured in this sale; that Durham paid for the goods in cash their value; that the Overtons sold the stock for the purpose of getting money to pay their creditors; that they so informed Durham and also Meyer Bros. & Co.'s attorney, while the sale was pending, both of whom believed the sale was being made honestly for that purpose; that Overton & Sons had no other intention at the time; that there were some liens on the stock which Durham required to be settled at the time; that Durham did not know the extent of Overton & Sons' other indebtedness, did not know the fact of their insolvency; and that the Overtons afterwards applied all the balance of the purchase money after paying off the liens, to their debts except a few hundred dollars (\$250 or \$300), which they used.

That there was evidence that the goods brought their reasonable value



in this transaction, that Overtons did not have any intent to hinder, delay or defraud their creditors when they made the sale, and that Durham did not have knowledge of their insolvency, nor of the further fact that Overtons were making the sale in fraud of their creditors, can not well be disputed.

The court submitted the case on the issue whether or not the Overtons sold for the purpose of paying off and discharging their debts and not for the purpose of defrauding their creditors, and were told if they found against such purpose to find for the defendant. But if otherwise to still find for defendant if he paid value in good faith without knowledge of such fraudulent intent. And to find for plaintiff if the Overtons were insolvent and made the sale for the purpose and with the intent to hinder, delay or defraud their creditors or either of them, and that defendant had notice of such intent.

Notice to defendant of a fraudulent intent or purpose was, under this charge, indispensable to plaintiff's recovery. Knowledge of insolvency was not enough.

The first assignment of error is that the court submitted to the jury the fraudulent character *vel non* of the transfer, the uncontradicted evidence showing (as the assignment alleges): (1) That Overton & Sons were insolvent and in failing circumstances, and had no other property than the stock of goods in question; (2) that a knowledge of these facts was brought home to Durham before he purchased or paid for the goods; (3) that Durham paid cash to the Overtons and did not see to the application of the money to the payment of the latter's debts, or make any effort to have it so applied; and (4) that in fact creditors of Overton & Sons were defrauded, hindered and delayed by the transaction in that the Overtons applied that large part of the money to other purposes than the payment of their debt.

The fact recited in item number 2 of the above not being an undisputed fact, this and the second assignment are not strictly well taken. The great preponderance of the evidence was not against any of the material facts as above found.

It is sought by propositions under these assignments to raise the question that if the Overtons were insolvent and Durham had notice of this, and paid cash for the stock without arranging for the money to be applied to creditors, then the law pronounces the sale a fraudulent one, without reference to intent, because as plaintiff in error expresses it there arises an inevitable presumption that Overton had a fraudulent intent and that Durham had notice of it. Granting that the question is fairly raised by the assignments, we regard the later decisions of our courts as against that view. *Sanger Bros. v. Colbert*, 84 Texas, 668; *Edwards v. Anderson*, 31 Texas Civ. App., 131, 71 S. W. Rep., 555, and cases cited; *Cross v. McKinley*, 81 Texas, 332; *Dittman v. Weiss*, 31 S. W. Rep., 67; *Texas Drug Co. v. Shields*, 20 Texas Civ. App., 274.

The third assignment complains of the following: In the fifth par-



agraph of the charge the court stated: "The fact that said Overton & Sons were at the date of said sale insolvent is not controverted in this case. The question as to whether or not defendant Durham had notice of the insolvency of said firm at said time is a question of fact for your determination under all the evidence in this case." In the seventh paragraph after charging the jury to find for defendant if he purchased the goods for a valuable consideration in good faith with no notice or knowledge of fraudulent intent of Overton & Sons, the court proceeded: "However, if you should believe from a preponderance of the evidence that at the time of said sale and transfer the said Overton & Sons were insolvent, and that they made said sale and transfer to said Durham for the purpose and with the intent to hinder, delay and defraud their creditors or either of them, and that defendant Durham had notice of such fraudulent intent as notice is heretofore explained," then you will find for plaintiff, etc.

The point made is that the latter charge was erroneous in submitting the question of Overton's insolvency on the evidence, when in fact, as the court had already stated to the jury, such fact was not controverted. The rule is that contradictory charges will require a reversal, unless the charge is so framed as in some distinct way to remove the contradiction. The charges were not contradictory. In one place the jury are told to find from the evidence whether or not Overton & Sons were insolvent, and in another place the court tells them in unmistakable terms that the evidence shows without dispute that they were insolvent. If the jury read and considered the entire charge they could not be misled, but must have known that they must find from the evidence in favor of insolvency, as the court had so instructed them. In one of the cases cited by plaintiff in error, *Baker v. Ashe*, 80 Texas, 361, it is said: "It is a rule that in construing the instructions given by a court to a jury they will be taken as a whole and one part may be looked to for the purpose of qualifying another." We think this disposes also of the eleventh assignment of error.

The rule invoked applies only when from a reading of the entire charge the inconsistent paragraphs leave the jury in doubt as to what to do.

The fifth and sixth assignments are overruled. There was no error in instructing the jury on the burden of proof, and the charge on this subject was not incorrect. The fact that Durham paid for the goods was undisputed. We conclude also that the seventh, eighth and ninth assignments present no error, especially so considering the entire charge. There is nothing of a substantial nature in the twelfth assignment.

*Affirmed.*

Writ of error refused.



## CITY OF JEFFERSON V. JENNINGS BANKING AND TRUST COMPANY.

Decided March 3, 1904.

**1.—City Charter—Construction—Negotiable Bonds—Issue.**

Charter of the city of Jefferson construed as conferring upon the city the power to issue bonds in the furtherance of the construction of railroads to or from the city and to make such bonds negotiable or payable to bearer.

**2.—City Bonds—Validity—Liquidation—Special Tax.**

It was not, in 1872, necessary to the validity of bonds, which a city was authorized to issue, to provide at the time for a special tax for their liquidation. The mayor and board of aldermen could levy such a tax but they might do so from time to time as occasion therefor arose. Nor was it essential that they should have set aside a part of the general annual revenue for that purpose, but their having done so did not vitiate the bonds.

**3.—Same—Innocent Purchaser for Value—Consideration.**

Where an innocent purchaser for value bought bonds issued by a city to secure money for the construction of a railroad, the fact that such bonds were without consideration would not be a defense to a suit by a bank, to whom such innocent purchaser had turned the bonds over for collection.

Appeal from the District Court of Marion. Tried below before Hon. J. M. Talbot.

*Geo. T. Todd*, for appellant.

*F. H. Prendergast* and *W. C. Lane*, for appellee.

JAMES, CHIEF JUSTICE.—Appellee brought this action May 21, 1896, upon three twenty-year bonds of the city of Jefferson for \$500 each, payable to bearer, with certain semiannual interest coupons. The answer alleged in substance that plaintiff not being incorporated until 1895 could not have acquired the bonds until after maturity. That the bonds were illegal and void without consideration; were ultra vires; never in fact issued, and that plaintiff acquired them long after maturity, paid nothing for them, and is not a bona fide owner and holder thereof.

The details of these matters pleaded, so far as necessary to the propositions in appellant's brief, will be explained in the course of this opinion.

The court gave judgment in favor of plaintiff against the city for the amount of the three bonds and the coupons that were not barred by limitation, and interest. The case having been tried without a jury, the court must have resolved all material matters of fact in favor of the validity and sufficiency of the bonds as obligations of the city.

The first and second propositions advanced are as follows: (1) "Under section 12 of its charter powers, coupled with the provisions of its city ordinance of August 10, 1872, the city could not issue a bond payable to bearer and negotiable and transferable by delivery only, and without providing any special tax. (2) "Where the officers of a city fail to pursue the requirements of the statutory enactment (charter) under which they are acting the corporation is not bound. In such cases the statute must be strictly followed and a person who deals with a



municipal body is obliged to see that its charter has been fully complied with."

Section 12 of the charter of 1866 gave the mayor and aldermen authority to levy a special tax for enumerated purposes, one being the construction of railroads to or from Jefferson, and it further provided that should the authorities of Jefferson deem it necessary for the accomplishments of the above objects, they are authorized and empowered to issue bonds not to exceed \$50,000, or as much thereof as may be necessary, the said bonds to be in sums of not less than \$100 nor more than \$1000, to be payable in not less than ten nor more than twenty years from the date thereof, and to bear interest at the rate of not more than 10 per cent per annum to be paid semiannually on presentation and surrender of the coupons to be thereto attached, for which payment the said board of aldermen shall have and are hereby invested with the power to impose and assess, as other taxes are collected, a special tax not to exceed 1 per cent per annum on all the property, real and personal, in the city not exempt; provided that in levying a special tax it shall require a concurrence of three-fourths of the whole board.

In 1870 the Legislature raised the amount of possible issue of bonds to \$500,000 and provided that the bonds may be used for any of the purposes named in section 12.

It is not claimed that at the date of these bonds there was any constitutional or other requirement for provision at the time for a tax to liquidate the principal and interest of this character of municipal indebtedness. The ordinance of August 10, 1872 (taking appellant's statement therefor), provided for \$25,000 twenty-year 8 per cent bonds payable to bearer, and in section 5 provides that out of the revenues of the city of Jefferson the sum of \$3000 annually shall be set apart and used for no other purpose than as sinking fund and for the payment of interest on the bonds aforesaid.

We conclude: 1. That under its charter the city clearly had power to issue bonds in the furtherance of the construction of railroads to or from the city and to make such bonds negotiable or payable to bearer as such bonds are usually drawn.

2. It was not necessary to the validity of such bonds for the board to provide for a special tax in reference to their liquidation; the power was given to them so to do, but the necessity of so doing at the time was not enjoined. They had the power to do this from time to time as the necessity or expediency therefor arose. It was not essential that they should have set aside and appropriated a part of the general annual revenue for that purpose, but their having done this did not vitiate the bonds. The revenues of the city at that period may have justified the expectation that it would never be necessary to resort to a special tax; and there is nothing in the ordinance which would evidence, as a part of the contract, that it was the intention that no special tax should ever be levied in connection with the bonds. If the provision for payment



out of the general funds proved ineffective or abortive, the city still had power under its charter to levy a special tax at any time or times for that purpose. We are not able to hold that the provision sought to be made in the ordinance vitiated the bonds. We conclude further, in reply to a suggestion in appellant's brief, that the power to issue bonds for such purpose was conferred by the charter in the most general terms and they could be lawfully issued for such purpose directly to a vendor of land to be used for a railway depot, as well as by a sale of their bonds and the use of the proceeds to purchase land for that purpose.

Under the second assignment we have this proposition: "Where it is shown that the bonds recited in the deed were not in fact delivered, and the land sought to be acquired and donated to aid in the construction of the Texas & Pacific Railroad was not in fact so acquired, donated and used for depot or any other purpose in aid of the construction of the road, then there was and is a failure of consideration inuring to the city and the road, and such bonds have no valid consideration to support them."

It was proved that J. H. Roberts bought the bonds in 1874 and paid for them \$1500 and had turned them over to plaintiff bank for collection and for suit, and that he knew nothing about the bonds except what appears upon their face. In other words there was evidence that he became an innocent purchaser for value of the bonds in 1874; that he was the equitable owner of them; and that the bank had become the holder of same for collection or suit for his benefit. The above being so, and doubtless so considered by the trial judge, a defect in the consideration would not avail defendant. But there was evidence of consideration. It is true the owner of the land, a Mrs. Brooks, testified she never received or saw a single one of the bonds and that she still claimed the land. It appeared, however, that she had given her son a power of attorney, and that she executed a bond for title dated August 12, 1872, agreeing to convey the eighteen acres to the city for twenty-year bonds; also that a deed from her by her said attorney in fact for said eighteen acres was executed to the city on September 25, 1872, reciting "in consideration of \$18,000 to me in hand paid by the corporation of the city of Jefferson on the bonds of said city of Jefferson payable to bearer twenty years after date thereof with interest at the rate of 8 per cent per annum from date, payable semiannually upon the first days of January and July of each year at the Citizen's Savings Bank of said city of Jefferson, by coupons attached upon the surrender of the corresponding coupon; said bonds bearing date September 2, 1872." Also that on October 2, 1872, the city executed a bond to convey said eighteen acres to the Texas & Pacific Railway. It appeared also that the location of the depot was changed and that the Texas & Pacific Railway reconveyed the eighteen acres to the city, and that the city afterwards in 1876 conveyed it to the East Line & Red River Railroad Company by quitclaim deed.



The bonds mentioned in the deed to the city correspond in description to those sued on; that the three bonds found their way into the hands of an innocent purchaser for value, for whom plaintiff holds them, was made to appear, and the testimony sufficiently indicates a consideration for the bonds and that they were presumably issued and delivered to said attorney in fact at the time of the execution of the deed, and any or either of such findings would not be disturbed as unsustained by the testimony. What may have been done afterwards, or whether Mrs. Brooks ever received or saw the bonds, would be immaterial as to an innocent purchaser for value.

What has been said in effect disposes of the remaining assignments. There is no doubt that if Roberts was a bona fide purchaser for value, any subsequent transferee or holder of them under him or for him would be protected as he was. This is the only point made by the fourth assignment and the proposition thereunder. There is no assignment which questions the right of the bank to prosecute this suit to judgment for the reason that Roberts, the real owner of these bonds, was not a party to the suit in persona.

*Affirmed.*

Writ of error refused.



## NATIVIDAD RODRIGUEZ ET AL. V. JORGE HERNANDEZ.

Decided March 3, 1904.

**1.—Sovereignty—Boundary—Political Question.**

The sovereignty of territory is a political question, and where the State exercises its authority de facto over a strip of land (one left by avulsion) the court will treat that as conclusive and exercise its judicial authority over such strip.

**2.—Title to Land—Boundary—River Channel.**

One can not recover beyond his title, and defendant in trespass to try title should have been allowed to show that the position of plaintiff's real boundary, the Rio Grande, was determined by the old river channel and that he had no right to recover to the new river bed, where the channel of the river had been changed by avulsion.

**3.—Sovereignty—De Facto and De Jure—Presumption.**

It was improper for the court to hold that there is a conclusive presumption, in support of the rightful exercise of jurisdiction by the State over a strip of territory, that the strip had been added by accretion, the court's right to exercise jurisdiction depending upon the State's de facto and not its de jure control of such territory.

Appeal from the District Court of Presidio. Tried below before Hon. B. C. Thomas.

*W. C. McGown and Edwards & Edwards*, for appellants.

*Beall & Kemp and P. H. Clarke*, for appellee.

JAMES, CHIEF JUSTICE.—Appellee brought this action of trespass to try title against appellants in reference to two adjoining 160-acre surveys, one patented to John Burgess, the other to Jesus Basquez. The description of the two tracts as given in the petition called for them to extend to the east bank of the Rio Grande. Defendants disclaimed as to all the land not included within certain field notes. As to this they pleaded not guilty and limitations. They alleged that since the location and patents of plaintiff's surveys the river has left its channel and by avulsion formed another channel west of that one, and "that plaintiff is not entitled to recover any land lying west of the line of said channel herein described 'defining its former channel.'"

The court ignored consideration of the issue as to the alleged change of the bed of the river, sustaining exceptions to that part of defendants' pleading, and objections to testimony offered in support of same, and submitted the case upon the issue of limitations alone, in reference to which the verdict was against defendants.

The evidence was objected to and excluded, on the following grounds: "(1) Because, on objection of the plaintiff, the court had excluded the pretended Rodriguez grant and the surveys made under it. (2) Because the surveys and patents under which plaintiff claims the land called for the banks of the Rio Grande, and the official map of the General Land Office, introduced by the defendants in evidence, shows that the Burgess and Larkin-Landrum surveys extend to the Rio Grande and



show no vacancy, and that the county of Presidio is bounded by the Rio Grande.

"And the court will take judicial cognizance of the territorial jurisdiction of the civil and political authorities of the State and county, and will conclusively presume that the claim of the State of Texas to the land in controversy at the date of the surveys and patents was rightful and not wrongful; and the court will follow the lead of the civil and political authorities and take judicial notice of its established international boundaries; and all evidence offered by plaintiff in contravention of the rightful claim of the government to the main channel of the Rio Grande as an international boundary is inadmissible."

The matter which defendants sought to have determined and which the court refused to allow, was the position on the ground of the west boundary line of plaintiff's surveys. It will not be disputed that under the plea of not guilty a defendant, though a trespasser, can have such matter adjudicated and have plaintiff's recovery confined to the true boundaries of his title, by showing what was sought to be established here, viz., that a boundary line being a river, that river had through avulsion changed its channel. In such case plaintiff would not be entitled to recover of defendant land beyond the thread of the river as it was before such change.

The foundation of the court's ruling seems to have been article 5 of the treaty of Guadalupe Hidalgo, which declares that "the boundary line between the two republics (United States and Mexico) shall commence in the Gulf of Mexico three leagues from land opposite the mouth of the Rio Grande, from thence up the middle of the river following the deepest channel where it has more than one, to a point where it strikes the southern boundary of New Mexico." Article 1 of the treaty of 1884 between the United States and Mexico provides that "the dividing line shall forever be that described in the aforesaid treaty and follow the center of the normal channel of the river named, notwithstanding any alterations in the banks or in the course of said river, provided such alterations be affected by natural causes through the slow and gradual erosion and deposit or alluvium, and not by the abandonment of the existing channel and the opening of a new one."

The view taken by the court appears to have been that defendants could not be permitted to prove that the river, as it existed when plaintiff's surveys were located and granted by the State of Texas, had afterwards in 1886, by avulsion changed its bed so as to run several hundred varas west of where it was when the surveys were granted, leaving between the old and the new channel a tract of land, for the reason that it was judicially known that the State of Texas was exercising its authority and jurisdiction to the Rio Grande, and the proof offered would tend to negative this authority and jurisdiction and prove that the strip was Mexican territory.

No principle is better established than the one which the court rec-



ognized and which can not be more clearly expressed than was done in *Jones v. United States*, 137 U. S., 212: "Who is the sovereign *de jure* or *de facto* of a territory is not a judicial one but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as other officers, citizens and subjects of that government." In the present case the court considered that as the fact of avulsion affects the sovereignty of the strip in question under the treaties, it is not a judicial question but a political one, and as this State exercises its authority to the Rio Grande where it now is, its courts will treat that as conclusive of the question of its boundary, and under no circumstances hear evidence that it had changed its bed by avulsion.

It seems to us that the court was right in so far as the exercise of its judicial authority over the strip was concerned. The fact that the State asserts its authority to the Rio Grande as it is, is conclusive upon the courts which administer its laws as to its authority up to such river; and its courts should treat such territory as a part of its lawful jurisdiction and administer the law there as is done in any other part of the State, regardless of whether or not any part of such territory is rightfully subject to its jurisdiction. But it seems to us, for this very reason, that our courts are required to administer justice and enforce the laws of the State in respect to such territory, as if such question did not exist, just as they are administered and enforced in other portions of the State. If the court is proceeding upon the theory that the State of Texas is exercising its authority to the river as it now runs, and that its own jurisdiction extends accordingly, upon what theory, we ask, can the position be defended that in trying title to land situated within that jurisdiction, a defendant is to be denied the benefit of defenses which the State universally accords its citizens elsewhere?

The case involves the boundary line of plaintiff's surveys as the primary question. The court is properly administering the laws of Texas to the river as it now runs, if the State authorities are doing so, which is a proper matter of judicial cognizance as it concerns the territorial limits of the court's jurisdiction, and when assuming to exercise jurisdiction over it, it should determine the questions raised and the rights of the litigants in said land, according to the laws of the State. In this State plaintiff can not recover beyond the extent of his title, and if his river boundary has undergone a change of channel through avulsion, he can not recover of defendant beyond his line as fixed by the original channel. If the defendant is denied the right to thus show the position of plaintiff's real boundary, then the court is not consistently holding to its jurisdiction over the land. It, however, does assert such jurisdiction over the entire land, but while denying defendant the right to make a well recognized defense, it adjudicates the strip to plaintiff and ousts defendants therefrom. For although the judgment may be so framed as to follow the field notes of plaintiff's



patents calling for the river, the force and effect of the judgment is to adjudicate title to the river as it was at the date of the judgment.

We think it is neither necessary nor proper for the court to hold in this case that there is a conclusive presumption, in support of the rightful exercise of jurisdiction by the State over this territory, that the strip has been added by accretion. The trial court's authority to exercise its jurisdiction at this place does not necessarily depend on the rightful exercise of political authority there by the State government, but it rests as well upon the State's de facto exercise of authority over it. If this exist, then the court's jurisdiction exists, and it is not at all necessary in support of the latter's jurisdiction, to take into consideration the de jure character of the State's act. The presumption of accretion is not necessary to uphold the court's jurisdiction. Once it has jurisdiction, it should exercise it in the ordinary way, and determine the rights of the parties in the land as is done elsewhere in the State. The judgment is reversed and the cause remanded.

*Reversed and remanded.*



ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v.  
JOE MAYFIELD.

Decided March 3, 1904.

1.—**Trespasser—Liability.**

One riding on a freight train, against the company's rules, is a trespasser and the company owes him no duty save not to willfully or wantonly injure.

2.—**Master and Servant—Liability for Servant's Act.**

The master is not liable for the acts of the servant in doing that which the master has no right to do and has not authorized, though such acts are done in good faith and with the intention to further the master's interest.

3.—**Same—Care of Injured—Charge.**

Plaintiff having been injured in getting off a freight train on which he was a trespasser, a charge instructing the jury to find for plaintiff if his injuries or sufferings were increased by the wrongful act of the servants of the railway in taking him, against his will, away from his home, the place where he was injured, to another town, for medical attention, was erroneous, plaintiff having failed to show that such acts of the servants were authorized or done in the prosecution of the master's business.

Appeal from the District Court of Hunt. Tried below before Hon. H. C. Connor.

*E. B. Perkins and Crosby & Dinsmore*, for appellant.

*Evans & Elder*, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by the appellee against appellant to recover damages for personal injuries alleged to have been inflicted by the negligence of the railway company. Appellee's petition contained two counts. In the first it was alleged in substance that on the 29th day of June, 1901, appellee boarded one of appellant's freight trains at Commerce, Texas, paid his fare from there to Neyland station, and thereby became a passenger on said train, with the right to be carried and treated as a passenger and safely put off at his destination. That when the train was nearing Neyland appellee was directed by the conductor to stand on the steps of the caboose and to alight when it slowed up; that he took his position on the steps as ordered and as the train slowed up and he was endeavoring to alight, appellant, with knowledge of his dangerous position, negligently and willfully caused the car on which he was riding to be suddenly and violently jerked, whereby he was thrown off, knocked insensible, his right foot run over and so mashed and mangled by the car wheels as to necessitate its amputation, to his damage in the sum of \$10,000.

The second count, after alleging appellee's fall from and injury by being run over by the train, alleged in substance that he resided near Neyland, where there were skilled and competent surgeons prepared to give him necessary surgical attention and treatment; that he had numerous friends there who desired to take charge of him and carry him home



and secure him the proper surgical attention and relieve him from his pain and suffering. But that appellant acting through its servants and agents in charge of said train, with knowledge of such facts, took charge of him immediately after his injuries, and, over his protest and against his will, placed him on the train and carried him to the town of Greenville, a distance of ten miles from Neyland, and then took him from the train and left him on appellant's platform alone among strangers in a helpless and almost insensible condition, where he remained an hour, until by chance one of his friends in Greenville carried him to his house where he remained until about 1 o'clock next morning, when his father, having learned of his injuries, came and carried him to his home near Neyland, arriving there about daylight, when surgical attention was first given to his injuries. That by reason of the unlawful and forcible taking charge of plaintiff against his will and carrying him to Greenville and leaving him helpless and alone as before stated, appellee's physical and mental pain arising from his injuries were greatly increased and prolonged for a period of about fifteen hours, to his damage in the sum of \$5000.

Appellant answered by pleas of not guilty, contributory negligence, that appellee was a trespasser on its freight train when injured and therefore it owed no duty to furnish him medical or surgical treatment or care, and that if its conductor in charge of the train undertook to carry appellee from Neyland to Greenville, he did so without its authority or consent.

The case was tried before a jury to whom was submitted by the charge of the court the matters plead in each count of appellee's petition, and a verdict was rendered on the second count in his favor for the sum of \$825, upon which the judgment appealed from was entered.

This verdict necessarily involves a finding in favor of appellant on the first count in appellee's petition. In other words that he was a trespasser and not a passenger on appellant's freight train, to whom the latter owed no duty save not to willfully or wantonly injure. *Houston & T. C. Ry. Co. v. Moore*, 49 Texas, 31. The evidence fully sustains such findings, for it shows that the rules of appellant prohibited and excluded passengers from being carried on its freight trains; that such rules were in force by the company, and it did not habitually permit passengers on such trains, and that appellee intruded himself upon the train without the knowledge or consent of appellant's servants in charge of and operating it, and that his injuries, caused from falling off and being run over, were proximately caused by his own wrong.

If the fact, established by the verdict, that such injuries were not attributable to the negligence of appellant, but were the proximate result of appellee's own negligence, appeared from the second count of the petition, it would be a matter of very grave doubt as to whether it shows any cause of action. If after an injury to a person for which a railway company is in no way responsible, the employes of the company forcibly and against his will take the injured party, place him on one of the com-



pany's trains, carrying him away from his friends and home and leave him unattended and uncared for in the broiling sun on the platform of another station, it certainly could not be contended that such acts were done in the course of the employment or could fairly and reasonably be inferred from the circumstances to be within the authorized power of the railway's servants. Such acts could only be considered as the malicious and wrongful acts of the employes unauthorized and unauthorized by their employer, extending beyond and outside of the scope of any duty arising or that could arise or be inferred from any duties of their employment. The master is not answerable if the servant takes on himself, even in good faith, and meaning to further the master's interest, to do that which the master has no right to do, even if the facts were as his servant thinks them to be (*Webb's Pollock on Torts*, 107); as where the conductor of a passenger train stopped his train, pursued a boy on foot into the house of the boy's father with pistol in his hand, and seized and carried him off on the train. *Gillian v. S. & N. A. Ry. Co.*, 70 Ala., 268.

This much, in view of another trial, we have deemed it proper to say in reference to the second count in the petition, though its sufficiency is not called in question by any of appellant's assignments.

The evidence shows that appellee at Neyland, in his effort to get off one of appellant's freight trains in motion, upon which he was a trespasser, fell, and his right foot was thrown under the car wheels and was mashed and mangled and that he was otherwise seriously injured; that he resided a mile and a half or two miles from the place where he received his injuries; that upon his fall, the train was stopped and the conductor, for the purpose of having his injuries treated by the company's surgeon at Greenville, which was about ten miles from Neyland, placed him on the train and carried him there, where he put him off at the depot and endeavored to find the company's surgeon in order to have his wounds treated; that his surgeon being temporarily absent could not be found, and the conductor not being able to secure the services of another surgeon without his pay being in some way secured, wired the company's superintendent as follows: "There was a negro beating his way on No. 15 to-day claiming his home at Neyland. Went to get off the train, fell under and got his right foot crushed. I picked him up and brought him to Greenville as there was no medical aid there. The company doctor is here and wants to know what to do with him." To which he received the following reply: "We are not responsible for the condition of the negro; turn him over to the city or county authorities." Appellee was then carried by an acquaintance to a negro's house about half a mile from the depot, his father sent for, who arrived there about 9 o'clock p. m., and his wound was dressed, and he was carried by his father to his home near Neyland, where surgical aid was procured and his foot amputated and other surgical attention given. There was evidence tending to show that appellant maintained a hospital at Greenville for the purpose of giving surgical treatment to passengers



hurt or wounded while in its charge, and that it was within the scope of duty of the conductor of the train on or by which a passenger was injured, to convey him to the hospital if he deemed it necessary.

We have thus summarized the testimony pertinent to the matters alleged in the second count in the petition in order that what we may say in passing upon the assignments of error may be clearly understood.

In the ninth paragraph of its charge the court in substance instructed the jury that if they believed from the evidence that if appellant's servants had left appellee at Neyland after he was injured, he would have received proper medical and surgical attention, and that if a person of ordinary prudence under the same circumstances would have left him there, and if appellee's sufferings were prolonged or increased by reason of his having been carried to Greenville, and the servants of appellant were guilty of negligence in carrying him there, and such negligence was the direct and proximate cause of such additional sufferings, they would find for appellee on the second count. This portion of the charge is complained of as error upon the ground that appellee's pleadings are insufficient to authorize the submission of such question to the jury, or to support a verdict in appellee's favor upon such issue, and that the uncontroverted evidence shows that appellant's servants in charge of the train in moving appellee to Greenville were acting without authority from appellant and beyond the scope of their authority as its servants or agents.

It will be observed from our statement of the allegations in the second count of appellee's petition, that there is no averment of any duty or undertaking on the part of appellant to give surgical treatment even to passengers who were injured while in its charge, or that it was within the scope of the duty of their employment for appellant's trainmen to carry on its trains persons injured while passengers thereon or any other parties injured by it to its hospital or where they could receive surgical treatment. Nor is the question of such duty either on the part of appellant or its trainmen involved in that part of the charge complained of. Had there been such averments it may possibly have been a question for the jury to determine whether the carrying by its servants of appellee, after he was wounded, away from near his home to Greenville, was within such apparent scope of their duty as would render the appellant liable for their act. But, as we have seen from the second count, the carrying of appellee from Neyland to Greenville by the trainmen was alleged to have been forcibly and unlawfully done against his will. A master can only be liable for the willful and deliberate wrongs committed by the servant when they are done on his account or for his purpose. To hold the master liable, the act must be done within the scope of the general authority of the servant. It must be in furtherance of the master's business and for the accomplishment of the object for which the servant was employed. The mode in which the servant performs the duty he is engaged to perform, if wrongful and willful and to the injury of another, renders the master liable although he may have



expressly forbidden the particular act. Whether the act in question can be implied from the general authority conferred upon the servant must in general depend upon the nature of the service he is engaged to perform and the circumstances of the particular case. *International & G. N. Ry. Co. v. Anderson*, 82 Texas, 520. In the case under consideration there are no matters plead which, if proven, would tend to show that the alleged wrongful act of appellant's servants in carrying appellee to Greenville was done within the scope of their general authority, in furtherance of their master's business, or for the accomplishment of the object for which they were employed. The master is not answerable for the act or negligence of its servant while doing something the master has not ordered done, if he has not authorized the servant to exercise a discretion in determining what to do. *Morris v. Brown*, 111 N. Y., 318.

Whether a servant really is bent on his master's affairs or not is generally a question of fact (*Texas & P. Ry. Co. v. Hayden*, 6 Texas Civ. App., 747; *Goodloe v. Railway Co.*, 54 Am. St. Rep., 85); and it is incumbent upon him who seeks to hold the master liable for the wrongful act of his servant, to allege and prove such facts as will show that the wrongful act causing the injury was done by the servant in prosecution of his master's business. This is not done in this case. We therefore conclude that the court erred in giving the portion of the charge complained of, for which error its judgment is reversed and the cause remanded.

*Reversed and remanded.*

Writ of error refused.



## STATE BANK V. J. BLAKEY &amp; Co.

Decided March 3, 1904.

**1.—Promissory Note—Want of Consideration—Innocent Purchaser—Fraud.**

Evidence considered and held to support a finding that a note given for wagons was without consideration, the wagons not being as represented, and that the indorsement of the note by the wagon company to a bank and suit thereby as an innocent purchaser was a mere fraudulent attempt to force the payment of an unjust claim, where the bank knew of such want of consideration and was protected by a bond from the wagon company indemnifying it against payment of costs, attorney fees or loss of suit.

**2.—Indorser and Indorsee.**

A bank to which a customer has indorsed a note of a third party, and which, after it has notice of the maker's defense of failure of consideration has funds of the indorser on deposit which it could apply in discharge of such indorser's liability on the note, can not enforce its collection against the maker on the plea of innocent purchaser. *Van Winkle Gin Co. v. Citizens Bank*, 89 Texas, 147, followed.

Appeal from the District Court of Ellis. Tried below before Hon. J. E. Dillard.

*W. H. Brown*, for appellant.

*S. C. McCormick*, for appellee.

**FLY, ASSOCIATE JUSTICE.**—This is a suit, instituted by appellant against appellees, on a promissory note for \$1285, executed by appellees to the Stoughton Wagon Company, and indorsed by the latter to appellant.

Appellees answered that the note was given by them to the Stoughton Wagon Company of Stoughton, Wis., in payment for twenty-five wagons ordered by appellees from the wagon company; that the wagons were to have sound oak hubs, and were to be good merchantable wagons in all respects; that the wagons were received and not examined by appellees until after the note was given, when it was discovered that the hubs of fifteen wagons were of oak but badly cracked and not merchantable and of little or no value; that the wheels of the remaining ten wagons were of birch and not oak as ordered. That the agent of the Stoughton Wagon Company inspected the wheels and agreed within six weeks to replace the defective hubs with sound oak hubs. It was alleged that the wagons with the defective hubs and hubs of birch were knowingly shipped to appellees by the wagon company, and that the note was without consideration. Appellees further answered that the wagon company obtained the note through fraud and had shipped them ten wagons which had wheels with hubs of birch that were worthless in the climate of Texas, and fifteen wagons the wheels of which had hubs cracked and worthless, and that the hubs had been thickly covered with paint to conceal the defects and the material from which they were made. That the wagon company having fraudulently obtained the note, immediately



transferred it to appellant, which took the note subject to all the defenses against it; that appellant did not pay cash or anything else of value for the note, but merely gave the wagon company credit for an amount less than its face on the books of appellant. It was further alleged that if appellant did not have notice of the want of consideration for the note it knew it before and after the note was due, and had full knowledge of all the circumstances attending the execution of the note. The allegations proceeded as follows:

"That at divers and sundry times between December 13, 1901, and December 22, 1901, and between December 13, 1901, and the date of the filing of this amended answer, and the date of the trial hereof, and on divers and sundry days of each and every month embraced within said above mentioned times and dates, there came and was in the hands of plaintiff, and there came and was in the hands of its banks, large sums of money belonging to said wagon company and subject to the disposal of plaintiff, and which might have been applied by plaintiff and in equity and good conscience should have been applied by plaintiff on said note and the payment thereof, and to the payment of the liability of said wagon company as indorser of said note; or, if not so applied, might and should have been held as security for the payment thereof; that on many of said days and dates said sums were in excess of the amount of said note, but whether more or less, each and all of said sums should have been so applied or held as far as necessary for the payment of full security of said note.

"That plaintiff and said wagon company are each incorporated under the laws of Wisconsin, and both have their residence and domicile in said State, and they reside but a few miles apart; that defendants are residents of Texas, and nonresidents of Wisconsin, and that by the laws of Wisconsin plaintiff had the right, as it knew, of collecting and enforcing the collection of said note against said wagon company as indorser thereon as if it were primarily and alone liable thereon and therefor, and without regard to the makers thereof the defendants, nonresidents of Wisconsin; that said company all the time was and now is solvent and amply able to pay and to be made said note to plaintiff; that if plaintiff had insisted on payment of said note by said wagon company or required it to pay the same, it would voluntarily have paid the same without suit, and resumed possession of said note as plaintiff well knew; but plaintiff instead of applying or holding said sums in its hands or a sufficient amount thereof on said note, and instead of so insisting and so requiring of said wagon company, utterly failed so to do; and did heretofore and before the bringing of this suit by it, in violation of its duty, enter into a conspiracy with said wagon company, inequitably and unjustly to defraud defendants and compel them to pay said note by this suit therein by plaintiff as a pretended innocent holder and purchaser thereof, and said suit being either directly or indirectly for the benefit of said wagon company and with intent to enable said



wagon company in effect to collect or have the benefit of the collection of the said note, and with intent to shut off defendants from a just and lawful defense against said note, under color of law and said suit, such defense being well known to them; and this said conspirators have done and ask to do willfully, knowingly and maliciously, and with intent to harass and oppress defendants with this suit, and compel them to pay the amount of said note and burden them with costs of suit and of attorneys fees in defending the same, and defraud them to the extent of said note and interest and said cost expenses and fees. That as a part of said conspiracy between plaintiff and said wagon company they, between the time of the maturity of the note sued on and the institution of this suit, entered into an agreement and understanding with each other, that said wagon company would make good and pay the plaintiff all attorney fees and expenses and outlays and costs of every kind that plaintiff in any manner might incur, pay or become liable for in the prosecution of this suit as plaintiff therein, and fully indemnify plaintiff in respect to the same, and, if plaintiff in this suit should fail for any reason to get judgment on the said note against defendant, or should fail to collect from them the full amount of such note that said wagon company would protect and indemnify plaintiff for such failure, deficiency or shortage and pay to plaintiff the amount of the same, and protect and indemnify plaintiff for and guarantee it against all loss, damage, expenses and cost of every kind above mentioned."

The cause was tried by the court without a jury, and judgment was rendered in favor of appellees. The facts justified the court in finding that the note was without consideration and that appellant had full notice of this fact a few days after the note became due, and of the fact that the Stoughton Wagon Company had knowingly perpetrated a fraud on appellees. The following findings of the court are also justified by the statement of facts:

"That from the date of the protest of the said note on December 13, 1901, down to the date of the deposition given herein by J. H. Palmer, vice-president and manager of plaintiff bank, on December 26, 1902, said wagon company kept an account with and in said bank, and often had balances to its credit therein; that said account was headed thus: 'State Bank in account with Stoughton Wagon Co.,' that on one side of said account was placed all deposits and credits of said company, and on the other side all cash sums paid out for or to said company by said bank; that between said dates said account consisted of several hundred items on each side; that between said dates, several hundred notes, drafts and checks in favor of said wagon company were discounted or cashed by said bank, and the amount thereof placed on the proper side of said account as funds or credits of said wagon company; that the sums so credited to said wagon company in said bank from January 1, 1902, to December 26, 1902, exceeded \$170,000; that on many days during the year 1902 and after said bank had notice of said failure of consideration



of the note sued on, said company had in said bank cash credits or balances in excess of debits; on some days these cash balances were less, and on others greater than the amount of the note sued on; and on some days the account would be overdrawn; that on five several days in December, 1901, and after December 13, said wagon company had five such cash balances to its credit exceeding the amount of said note; and in January, 1902, one; in February, 1902, eight; in April, 1902, three; in May, 1902, two; in August, 1902, two; and between September 3 and September 11, 1902, four; twenty-five several cash balances in said bank greater than said note, between December 13, 1901, and September 13, 1902, and said balances severally ranging in amount from \$1334.25 to \$3042.75; that the credits and deposits of said wagon company in said bank were general and not special, and the excess of credits over debits shown at any time or the amount of cash balances were applicable and could have been applied by the bank to any then existing matured debt owing by said company, including the past due indebtedness of said company to said bank as indorsers of the note sued on and for the amount thereof.

"That on September 5, 1902, said Stoughton Wagon Company, in consideration that plaintiff would sue the defendant on the note sued on, executed to plaintiff a writing that said company would reimburse plaintiff for all expenses incurred in such suit, and would promptly take up said note on demand at any time, and would assume all responsibility for attorney's acts. And directing that said note be sent to W. H. Brown, attorney at Ennis, with instruction to sue, etc.

"That said bank and said wagon company knowing of said failure of consideration, combined and conspired to the end that this suit would be brought in the name of the bank for the virtual benefit of said company, with intent to cut defendant off from their defense of failure of consideration of the note sued on."

The facts in this case are strikingly similar to those in the case of Van Winkle Gin Co. v. Citizens Bank, 89 Texas, 147, in which it was decided that the bank that held the dishonored paper could not recover because it had in its possession, at the time that it learned of the dishonor of the paper, funds belonging to the indorser of the draft sufficient to pay the amount of the draft. The court said: "The case then comes to this: the indorser in good conscience should pay; the bank has its funds in its hands sufficient to satisfy the demand with a perfect right in equity to offset same in satisfaction of the bill; the pursuit of the acceptor in a foreign jurisdiction is clearly not necessary to the bank's protection, but can only serve to allow the indorser to avail himself of the protection given by law to an innocent purchaser in order to cut the acceptor off from a just defense and compel it to pay a sum of money which in equity it should not pay."

In this case the bank had the wagon company, a solvent corporation, bound as an indorser of the note, and in addition brought the suit at



the instance and request of the indorser and was given a bond indemnifying it against payment of costs, attorney's fees, or any other loss. In fact it could be concluded with reason, from the facts, that the bank was a mere figure head, and that the suit was being prosecuted for the benefit of a corporation that could not successfully prosecute it in its own right. Appellant was using its shield and defense of innocent holder to protect a corporation that had defrauded appellees, and under cover of its want of notice, prior to the maturity of the note, of the failure of consideration, was attempting to force the payment of an unrighteous claim. If the law is as stated in the case of Van Winkle Gin Co. v. Bank, the trial court was clearly right in rendering a judgment for appellees.

The assignments of error need not be further considered, as neither of them presents any error requiring a reversal. The judgment is affirmed.

*Affirmed.*

Writ of error refused.



## WILLETT WILSON V. JOHN CLARK.

Decided March 3, 1904.

**1.—Pleading—Sale of Land—Agent.**

Evidence considered and petition held to show a good cause of action on an oral agreement providing that a real estate dealer should be paid a commission for securing purchasers for a tract of land, where such purchasers were found and showed a willingness and ability to purchase upon the terms agreed upon between the owner and the agent.

**2.—Same—Written Contract—Option—Parol Evidence.**

The agent negotiating a sale of land for the owner was not bound by the terms of a contract in writing between such owner and the purchaser found by him in relation to the proposed sale; though it secured for the purchaser a mere option, on payment of earnest money, and did not bind the purchaser to take the land, such agent, in a suit to recover his commissions from the owner, could show that the purchaser was willing and able to take the land on the terms at which the owner authorized him to sell.

**3.—Land Agent—Expense of Abstracts.**

In the absence of an agreement by an agent negotiating a sale of land for the owner to pay for abstracts of title required on such sale, he may recover from the owner, in addition to his commissions, the expense incurred in procuring such abstracts.

Appeal from the District Court of Calhoun. Tried below before Hon. James C. Wilson.

*Davidson & Bailey*, for appellant.

*Proctors*, for appellee.

GARRETT, CHIEF JUSTICE.—Willett Wilson brought this suit against John Clark to recover the sum of \$2175 as  $2\frac{1}{2}$  per cent commissions on the price of a body of land belonging to the defendant for which the plaintiff alleged he, as the agent of defendant, had procured purchasers. Demurrers to the petition were sustained by the trial court and judgment was rendered in favor of the defendant. The petition alleged an oral agreement made November 1, 1902, by which the defendant requested the plaintiff, and the plaintiff undertook, to find a purchaser or purchasers for 8700 acres of land belonging to the defendant within a reasonable time at \$10 per acre upon a commission of  $2\frac{1}{2}$  per cent to be paid when such purchasers were found or when the sale was made. That the plaintiff sold the land to I. P. Kibbe, Levi Paul and J. H. Dawson at the sum of \$10 per acre to be paid one-third cash when a survey had been made and the title approved by the attorneys of Kibbe and his associates, the balance to be paid in five years if desired by said Kibbe and associates in equal annual installments with 7 per cent interest, and the right reserved to pay the deferred installments at any time. That Kibbe and his associates paid the defendant \$500 as earnest money on said sale with the understanding that it should be applied as a part of the purchase money, but in the event the title to the lands should not be approved by Kibbe and associates or their attorneys within a reasonable time said sum was to



be returned; and that the defendant executed his receipt for said earnest money which was marked exhibit A and attached to the petition as follows:

"The State of Texas, County of Calhoun. This is to certify that I have this day received of I. P. Kibbe, for account of himself and associates, \$500 earnest money on the purchase from me of my ranch lands situate in Calhoun and Victoria counties, consisting of about 9200 acres of land, be the same more or less. Said amount to be applied on cash payment of purchase price, when abstracts are approved and title accepted by the attorneys for said Kibbe and associates; it being expressly understood that there is excepted in the sale of the above mentioned lands that portion of same on which the improvements and homestead of said John Clark is situated, including about five hundred acres of land. The said above described land I agree to sell to said Kibbe and associates at \$10 per acre for actual number of acres to be conveyed, upon the following terms, to say: one-third cash when survey of land has been made and title has been approved by said Kibbe and associates' attorneys, the balance to be paid in five years, if desired by said Kibbe and associates, in equal annual installments; said deferred payments to bear interest from date of execution and delivery of good and sufficient deeds with warranty of title and possession, at the rate of 7 per cent per annum from date until paid, it being understood that said Kibbe and associates are to have the right to take up and cash the said deferred payments at any time they may elect to do so. And it is further agreed that said earnest money is to be returned to said Kibbe and associates in the event title to said lands should not be approved by their attorneys, and same can not be perfected within a reasonable length of time. Dated this 8th day of February, 1902. (Signed) John Clark."

The plaintiff further alleged that the said defendant John Clark, in utter disregard of his said contract as aforesaid for the sale of the above described 8700 acres of land to the said I. P. Kibbe, Levi Paul and J. H. Dawson, who were ready, willing and able to take said land for the sum of \$87,000 and to pay for it as by them stipulated, refused and failed, and still refuses and fails, to comply with the said sale of the same made by him through this plaintiff, his duly authorized agent for the sale of the said land which has been made in pursuance of the said verbal contract of the date of the 1st day of November, 1901, which said contract he ratified in the execution of said earnest receipt marked exhibit A, and by various and sundry acts before and since said time; and did again on the 26th of May, 1902, settle with the said I. P. Kibbe, Levi Paul and J. H. Dawson all damages sustained by them on account of the failure on the part of the said defendant, John Clark, to execute said deeds for said lands as aforesaid, and did fail and refuse to carry out said sale. A copy of which said agreement of settlement between the said I. P. Kibbe, Levi Paul and J. H. Dawson is hereto attached, marked exhibit B and made a part of this petition. Then followed aver-



ments of liability to pay the commissions and indebtedness, etc., on the part of the defendant. Exhibit B purported to be the settlement of a controversy between the defendant and Kibbe and his associates of the liability of the defendant, which was not admitted by him but denied upon "an option contract" for the purchase of said lands which was identified as exhibit A above set out. There were further allegations asserting the liability of the defendant to the plaintiff for making and procuring abstracts of the title to the several tracts of land composing the body to be sold, which the plaintiff alleged was reasonably worth the sum of \$325, making a total alleged indebtedness of \$2500, for which the plaintiff prayed judgment. In addition to the general demurrer the defendant presented ten special demurrers to the petition. The trial court sustained three of the special demurrers, but overruled the general demurrer and the other special demurrers. The defendant has made cross-assignments of error upon the action of the court in overruling five of his special demurrers.

An agreement to pay commissions to a real estate agent to procure a purchaser for land upon terms given need not be in writing to bind the owner of the land when the agent procures a person who is ready, willing and able to make the purchase upon the terms proposed though no sale is effected. *Conklin v. Krakauer*, 70 Texas, 735; *Brackenridge v. Claridge*, 91 Texas, 530. The petition alleges that the plaintiff procured Kibbe and his associates as purchasers of the land and agreed upon terms of sale to them which were satisfactory to the defendant, and that they were ready, willing and able to comply with the terms of sale and take the land when the same should be surveyed and the title shown to be satisfactory, but that the defendant failed and refused to comply with the sale. It is an implied condition in such contracts for the purchase of lands that the title should be perfect. The petition therefore showed a good cause of action unless, as contended by the defendant, the written receipt executed by Clark embodied the entire agreement of Kibbe and his associates to purchase the land, and must control all other averments of the petition to show that they were ready, willing and able to do so; that it is void and wholly insufficient to constitute a contract of sale for the want of mutuality; and that at most it was only an option to purchase based on acceptance and performance by Kibbe and his associates, and the petition wholly failed to allege any acceptance of said instrument and also failed to allege any performance on the part of Kibbe and his associates. It is immaterial whether the receipt is an instrument of which specific performance may be enforced. It undertakes to set out the very terms of the sale which the plaintiff was authorized to make and is a ratification thereof by the defendant. Its terms would not be varied by parol evidence that the purchasers were ready, willing and able to take the land when the title had been passed on as satisfactory; and allegations of the petition were sufficient as to acceptance and performance. In the case of *Brackenridge v. Claridge*, *supra*, there was a pure option and the parties did not then



agree to buy the land, the sale to be consummated when the titles should be found perfect, but only took an option to do so. In the case under consideration the purchase is agreed upon and the purchasers are ready and able to carry it out as soon as the title shall have been passed on as satisfactory. The petition does not rest the plaintiff's right to recover upon the procurement of the agreement, but upon the proposed purchase as evidenced by the agreement with which Kibbe and his associates were ready, willing and able to comply. This averment of willingness, readiness and ability to purchase is not a mere conclusion of the pleader. The fact could not have been alleged in apter words. They will be referred to the terms of the sale and could mean nothing else than a willingness to buy and a readiness to do so with ability to pay the purchase money and execute the notes whenever the title was shown to be perfect. It can not be contended from any proper construction of the agreement that Kibbe and his associates were to have the land surveyed. It is immaterial whether there was a consideration to support a valid option to purchase, since the petition averred that the intending purchasers would accept the offer. The facts shown by exhibit B were properly alleged to show an insistence by Kibbe and his associates upon their right to purchase in accordance with the terms of the agreement. None of the cross-assignments is well taken. The pleading setting up the item for the furnishing of the abstracts of title was improperly stricken out. There is nothing in the petition to show that the preparation and furnishing of abstracts were included in the plaintiff's obligation to find a purchaser for the land. The court erred in sustaining the exceptions to the petition, for which error the judgment will be reversed and the cause remanded.

*Reversed and remanded.*



INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY v.  
J. J. SAMMON.

Decided March 3, 1904.

**1.—Mental Anguish—Failure to Stop at Flag Station.**

The failure of the employes on defendant's train to stop at a flag station when flagged warranted a judgment for damages for personal inconvenience caused by plaintiff being forced to walk two miles in the dark over rough roads; but was not ground for recovery of damages for mental anguish caused by delay in reaching a dying grandchild under circumstances not known to those who failed to stop on his signal.

**2.—Same—Notice.**

Notice to the station agent at another place or to the conductor on another train of the object of a passenger's trip and his intention to return that night was not notice to the employes of the train which refused to stop for him when flagged nor to the company.

Appeal from the County Court of Montgomery. Tried below before Hon. J. T. Rucks.

*N. A. Stedman and Gould & Morris.* for appellant.

*Nugent & Foster,* for appellee.

GARRETT, CHIEF JUSTICE.—J. J. Sammon brought suit in the County Court of Montgomery County against the International & Great Northern Railroad Company to recover damages for the failure of the defendant to stop its passenger train for him on the night of December 24, 1902, at Kelly's Switch, a flag station on the line of defendant's railroad at which the plaintiff was intending to take passage and go to the town of Conroe, another station on defendant's railroad. The plaintiff alleged that as a result of the failure of the defendant to stop the train he was compelled to walk two miles in the darkness over rough roads; and that he was delayed sixteen hours in returning to Conroe where his little grandchild, William Lee Sammon, was dangerously ill and during said delay died. He further alleged that the illness of said child and plaintiff's relationship to it were known to the defendant; and that he suffered damage in the sum of \$950, to wit, general damage \$250 and special damage by reason of mental anguish \$700. The defendant demurred to the petition generally and specially, and pleaded a general denial and specially denied that it had any knowledge of plaintiff's desire to take the train and the purpose for which he desired to take it. The cause was submitted to a jury and resulted in a verdict and judgment for the plaintiff for the sum of \$150. The verdict assessed the damages at "\$5 general damages for walking and \$145 special damages for mental pain and anguish."

The plaintiff lived at Conroe, where his grandchild, William Lee Sammon, was very ill. Having been requested by the child's mother to go to Kelly's Switch after her parents, Mr. Crawford and wife, he went to the defendant's station at Conroe on the evening of December 23,



1902, to take the train and asked for a ticket to Kelly's Switch, which is about twenty-two miles north of Conroe. The agent told him that he could not sell him a ticket to Kelly's Switch because the next train did not stop there, but suggested that perhaps the conductor would slow up and let him off. The agent knew of the illness of plaintiff's grandchild and the purpose of the trip. He bought a ticket to Waverly, a station several miles from Kelly's Switch, and when aboard the train asked the conductor to let him off at Kelly's Switch, but the conductor told him he was not allowed to stop there and could not and would not do it. Plaintiff got off at Waverly and walked to Crawford's residence, which is about seven miles from Waverly and two and one-half miles from Kelly's Switch. He went to Kelly's Switch about 12 o'clock that night to return to Conroe and flagged the south-bound train, but the train failed to stop and he had to walk back to Crawford's during a dark night and over a muddy road and did not get back to Conroe until the next evening's train, and was delayed sixteen hours, during which time his grandchild died. When he asked the conductor to stop the train and let him off at Kelly's Switch he told the conductor that his grandchild was very sick and that he wanted to get back upon the next train. Kelly's Switch was a flag station at which the regulations of the company required passenger trains to stop when flagged. Plaintiff flagged the train in the customary manner but the signal was disregarded.

The defendant would be responsible for such direct and consequential damages flowing from its failure to stop the train when flagged as were reasonably in the contemplation of the parties, such as the physical suffering alleged in the petition caused by the walk back to Crawford's; and for such other or special damages directly resulting from such failure which, although not otherwise reasonably within the contemplation of the parties at the time, might have been anticipated from the facts within its knowledge, would be the result of its failure to stop the train. The petition alleged that plaintiff's grandchild was dangerously and violently ill at Conroe, which was well known to the defendant as well as the fact of the relationship of the child to plaintiff; and that the defendant through its agents, servants and employes negligently, willfully, unlawfully and wrongfully refused and neglected to stop said train, or to permit the plaintiff to take passage thereon. This is a pleading of such special facts, to wit, the relationship of the child to the plaintiff and its severe illness, as would entitle the plaintiff to recover for mental anguish for the failure of the defendant to stop its train and take him as a passenger. *International & G. N. Ry. Co. v. Anchonda*, 68 S. W. Rep., 743; *Armstrong v. Ry. Co.*, 92 Texas, 117; *Jones v. Ry. Co.*, 23 Texas Civ. App., 65, 55 S. W. Rep., 371; *Western Union Tel. Co. v. Simpson*, 73 Texas, 426; *Stuart v. Tel. Co.*, 66 Texas, 584.

A distinction must be observed between those cases which establish what is called the Texas rule which allows damages for mental anguish



on breach of contract and those which deny recovery for mental anguish in cases of tort unaccompanied by physical injury. Among the latter cases may be cited Gulf C. & S. F. Ry. Co. v. Trott, 86 Texas, 413. The cases, however, do not make the distinction very clear. In the failure of the defendant to stop its train for the plaintiff there was a breach of its implied contract and duty as a carrier of passengers, since the plaintiff went to the station intending to become a passenger in accordance with the regulation of the defendant to stop at Kelly's Switch when flagged. The general demurrer to the petition was therefore properly overruled. But the evidence failed to show notice to the defendant of the facts that would render it liable. The knowledge of the agent at Conroe or of the conductor on the north-bound train that the child was sick and that it was the purpose of the plaintiff to go to Kelly's Switch for its mother's parents and return the same night was not notice to the defendant of such purpose. The facts were not communicated to either of said employes in the making of a contract of carriage or in connection with the performance of any duty by them. The agent at Conroe refused to sell a ticket to Kelly's Switch and there was no understanding or agreement in the sale of the ticket to Waverly other than that the plaintiff would be carried to Waverly. Missouri K. & T. Ry. Co. v. Belcher, 88 Texas, 549. The court erred in charging the jury that notice to the agent of the defendant company was notice to the company. No cause of action was shown except for the damages resulting from the walk back to Crawford's. It is unnecessary to pass on the remaining assignments of error. The judgment of the court below will be reversed and judgment will be here rendered in favor of the plaintiff for the sum of \$5 and all costs except the costs of this appeal, which are adjudged in favor of the defendant.

*Reversed and rendered.*



## CITY OF HOUSTON V. J. A. ESTES.

Decided March 5, 1904.

**1.—City Charter—Constitutionality—Tenure of Office.**

Sections 26 and 26a of the charter of the city of Houston, placing the employees of the police, fire and health departments under civil service regulation and providing that they can only be discharged upon complaint for cause made to a board established for this purpose, appeal lying to the city council, held unconstitutional in so far as they fix the tenure at life upon good behavior. The constitutional term of two years will govern, subject to such regulation.

**2.—Pleading—Discharge of Policeman—Mayor—Power of Appointment.**

It was not error to overrule a special exception to an allegation that the city marshal, who discharged plaintiff, had suggested his name to the mayor who nominated him for a place on the police force, such an allegation not being subject to the objection that it sought to take away from the mayor his independent power of appointment, the mayor having no such independent power.

**3.—Assignment of Error—Policeman Not a Distinct Office.**

An assignment of error complaining of the court's action in sustaining a special exception addressed to the defense that the city had appointed a successor to plaintiff, a discharged policeman, and plaintiff had not tried to oust him by suit and was therefore estopped to set up his right to the office, is properly overruled, since the office of policeman is not a distinct office, and though new policemen were appointed no particular person took plaintiff's place.

**4.—City Ordinance—Bonds of Officers—Sureties.**

A city ordinance requiring sureties on bonds of municipal officers bind themselves to pay all fines assessed against such officers for official misfeasance is merely declaratory of the legal effect of such instruments. Where the bonds comply with the requirements of the city charter, they need not embody the terms prescribed by the ordinance.

**5.—Official Bond—Curing Defects.**

The execution of a proper bond is not a condition precedent to the right to the office; if there is any valid objection to the bond it must be urged and the official given an opportunity to file another curing the defect.

**6.—Policeman—Other Employment.**

The fact that plaintiff served ten days as a special policeman by appointment of the mayor held not to be an abandonment of the office of regular policeman.

Appeal from the District Court of Harris. Tried below before Hon. W. P. Hamblen.

*T. H. Stone*, City Attorney, for appellant.

*Wilson & Jackson* and *Lock McDaniel*, for appellee.

GILL, ASSOCIATE JUSTICE.—This was an action brought by the plaintiff, J. A. Estes, to recover of the city of Houston his salary as policeman. A trial before the court without a jury resulted in a judgment for the plaintiff for \$1979.98. The city has appealed.

For cause of action the plaintiff alleged in substance that on April 20, 1898, he was duly appointed and qualified as a regular policeman of said city and served as such until August 11, 1898, when without fault on his part the city marshal undertook to discharge him and thereafter refused and persistently refused to allow him to perform any





further duties as such officer. That without fault on plaintiff's part and without assigning any reason therefor the marshal informed him that he need not report for duty any more and that he (the marshal) "would have to let him out." That at the date of his appointment and at the date of his discharge the city was acting under its special charter which became a law on the 12th day of May, 1897. That he secured his position by appointment of the mayor and the approval of the city council, and under one of the charter provisions he could not be removed from office except upon trial before the tribunal provided by the charter for the purpose and upon charges duly presented. That no such charges have been preferred nor any such trial had, nor has he been guilty of any misconduct which would justify his removal. That by sections 26 and 26a of the charter it was provided that the terms of service of the members of the police, fire and health departments of the city, except the heads of such departments, should continue during efficient service and good behavior, and that no member of either of said departments should be discharged unless proven guilty of an offense of sufficient gravity in the opinion of the police, fire and health board to warrant such discharge, and if the judgment of the board should be adverse to the party charged an appeal to the city council would lie. That plaintiff's compensation had been duly fixed at \$75 per month, payable monthly, and he was duly paid at that rate up to the time of his attempted discharge, since which time, though he has continuously held himself ready to perform any duty assigned him as such officer, his name has been stricken from the roll of policemen. He has been persistently refused assignment to duty and the city has refused to pay his salary.

To the petition the defendant interposed a general demurrer and eighteen special exceptions.

The court overruled all demurrers and exceptions to the petition except that addressed to the allegations seeking a recovery for a longer period than two years from the date of his appointment, which was sustained.

Answering to the merits defendant set up the following defenses:

1. That plaintiff prior to his appointment and qualification did not stand an examination as to his fitness and qualification for the office as prescribed by the charter and ordinances.

2. Limitation of two years.

3. That plaintiff had not complied with the requirements with reference to the execution of a bond before entering upon the duties of his office.

4. That by article 216 of the revised ordinances of the city the marshal was clothed with the power to suspend or discharge policemen for malfeasance or misfeasance, his action to be reviewable on appeal to the city council. That plaintiff did not appeal from the exercise of this power on the part of the marshal, but acquiesced therein, devoting his



time to private pursuits which were incompatible with the further performance of his official duties. That his successor was appointed and qualified, discharging the duties of the office, receiving the salary therefor, and plaintiff has brought no suit to oust him, wherefore he is estopped to deny that he has acquiesced in his discharge and abandoned his office.

5. That the marshal in discharging him acted on authority of the mayor, who had the power to discharge plaintiff at any time.

6. That shortly after plaintiff's discharge the city council appointed a full corps of policemen, some one of which actually succeeded plaintiff in his office, and since he has not been ousted by a suit for the office plaintiff's suit must fail.

7. That the marshal discharged plaintiff for drunkenness in office, and plaintiff's allegation that he was discharged without cause is untrue.

Plaintiff filed a supplemental petition containing among other things an exception to that part of the answer which sets up as a defense that the city appointed a full corps of policemen after plaintiff's discharge, and that some one of them, which defendant is unable to name, succeeded plaintiff. This exception was sustained.

It was not necessary to set out the remainder of the supplemental petition. Nor have we deemed it essential to set out the pleadings otherwise than in a most general way. They are lengthy and set out fully the various sections of the charter and ordinances upon which the parties respectively rely.

On the trial plaintiff established his appointment as alleged; his confirmation by the council; his qualification thereunder and service until August 11, 1898; his dismissal by the marshal; his offer thereafter to serve and his readiness always to do so; the persistent refusal to accept his services and the dropping of his name from the roll.

It was also shown that the stipulated salary was \$75 per month and that payment was refused when his services were dispensed with.

It was also shown that thereafter a full corps of policemen was organized by the city and the appointees duly qualified, but it appeared that the nature of the office was such that plaintiff had no successor, nor did defendant undertake either to aver or prove that the vacancy left by plaintiff's discharge was filled by a subsequent appointment, but confessed its inability to name such person.

Such other facts or details as are necessary to the determination of the case will be set out in their proper connection.

Appellant contends under the first assignment that the court should have sustained the general demurrer, because sections 26 and 26a of the city's charter by which the policemen's terms of office was prescribed is violative of the Constitution and plaintiff's appointment to the office a nullity.

The articles in question evidence a purpose to place the employes of



the police, fire and health departments of the city of Houston under what is known as civil service regulations, the provision being to the effect that the appointees shall hold office during good behavior and efficient service and shall not be discharged except upon complaint for cause. The charter establishes a tribunal for the hearing of such complaints to be known as the police, fire and health board. No officer or employe is removable except by the judgment of this board, its action being reviewable by the council.

The effect of these provisions, if valid; would constitute an office for life if good behavior and efficient service were commensurate. But that such effect can not be given them has been decided. It has also been settled that since the Constitution limits the terms of all officers, not otherwise fixed, to two years, this provision will be construed to fix the tenure at the constitutional term subject to the provision of removal for cause during that time. That the unconstitutional provision may be discarded without nullifying the entire law is held in *Albers v. City of Houston*, 73 S. W. Rep., 1084; *Proctor v. Blackburn*, 28 Texas Civ. App., 351, 67 S. W. Rep., 548; *Cawthon v. City of Houston*, 71 S. W. Rep., 329. It follows that the general demurrer was properly overruled.

In view of the rule announced in the cases cited it follows also that the proposition urged by appellant that as no term of office was fixed the plaintiff held at the will of the appointing power, is without merit. Such authorities as *Keenan v. Perry*, 24 Texas, 263, are inapplicable for obvious reasons.

Under the third assignment defendant complains of the overruling of the second special exception which is addressed to the allegations that the marshal suggested plaintiff's name to the mayor, who nominated him for a place on the police force and his nomination was thereafter confirmed by the city council, and that on the same day he took the oath of office and was assigned to duty.

The points urged against the allegation are in substance:

1. That it is thereby sought to take from the mayor his independent power of appointment.
2. The allegation that he qualified for the office is a conclusion of the pleader.
3. It was not shown what was necessary to be done to qualify as such officer.

The first point is without merit, because under the ordinance regulating the appointment of policemen the mayor had no independent power of appointment, and under the charter he had no authority to discharge.

The second and third points, if valid against the original petition, are cured by sufficient allegations in the supplemental petition.

The thirteenth assignment can not be sustained, because though the police, fire and health board is authorized to formulate rules for the examination of applicants for positions on the police force, yet if none



were made it would not affect plaintiff's right to the office. If the board had in fact made rules and the plaintiff had not submitted to them it would at most be defensive matter to be set up by the city. The question can not be raised by exception. This also disposes of the fourteenth assignment.

The other exceptions to the pleadings are not presented in the brief.

By the sixteenth assignment defendant assails the action of the trial court in sustaining plaintiff's special exception number 2. This exception was addressed to the defense that the city had appointed a successor to plaintiff and the latter had not sought to oust him by suit or otherwise, and was therefore estopped to set up his right to the office.

The answer discloses that the office of policemen was not a distinct office, and that while new policemen were appointed no particular person took plaintiff's place. We think the exception was rightly sustained for the reason suggested. *Albers v. The City*, supra.

This disposes of the several assignments addressed to the refusal of the court to hear proof upon the issue.

The plaintiff proved that in qualifying for the office he executed and delivered to the mayor a bond in the sum of \$500 with two sureties conditioned as required by law. That it was prepared according to the blank printed form furnished by the city. Was accepted by the mayor. That he was thereupon assigned to duty as alleged, and that no question had been made as to its sufficiency either in form or substance by the city or anyone for it.

This proof was objected to on the ground (1) that the bond did not appear to be approved; (2) that the ordinance required the sureties to append written affidavits as to their solvency, which was not done; and (3) that the ordinance required the sureties to bind themselves to pay all fines assessed against the principal for official misfeasance, and it was not so conditioned.

The third objection is untenable in any event, because the bond is conditioned as required by the charter. The provision of the ordinance that the sureties shall be responsible for fines imposed against their principal is merely declaratory of the legal effect of the instrument and is not a prescribed condition of the bond.

But aside from this none of the objections are material, for the proposition that the execution of a proper bond is not a condition precedent to the right to the office is sustained by the decided weight of authority. If there is any valid objection to the bond it must be urged and the official given an opportunity to file another curing the defect.

It was shown that in December, 1898, plaintiff was appointed by the mayor as special policeman, served ten days as such, and received therefor \$2.50 per day.

It is contended by appellant that this was an acceptance of an inconsistent office and operated as an abandonment of the other. Further, that the court should at least have credited the amount of recovery with the sum thus received



The mayor is empowered to appoint special policemen to meet emergencies, the employment to terminate when the emergency ceases. While the question is by no means free from doubt, we are of opinion a special policeman appointed under the above authority to meet an emergency, which by its nature forbids the resort to the usual form of recommendation, approval, etc., is not an officer in the sense contended for by appellant. It follows that the acceptance of the brief employment referred to did not amount to an abandonment of the office in question.

While the questions made and the manner of their presentation has rendered it necessary for us to dispose of most of the assignments in detail, the case is nevertheless a simple one, the facts without complication, and the questions simple and most of them well settled.

The plaintiff was appointed and entered upon the duties of an office which he might hold for two years unless lawfully ousted. The charter has been thus construed and the question is not an open one. *Cawthon's*, *Albers' and Proctor's cases*, *supra*.

While the manner of his qualification might not have been in strict conformity with the requirements of the charter and ordinances, he took the official oath and gave a bond which was accepted without objection and no question was made concerning it at any time during his term. That under these facts he became an officer *de jure* is sustained by the weight of authority. *Smith on Mod. Law of Mun. Corp.*, sec. 184; *Mechem on Pub. Off.*, sec. 255-267; *Cronin v. Willard*, 97 N. Y., 271; *Foot v. Styles*, 57 N. Y., 399; *McGregor v. Supervisors*, 37 Mich., 388; *People v. Benfield*, 80 Mich., 265; *Glavey v. U. S.*, 182 U. S., 595; *U. S. v. Bradley*, 10 Pet., 343; *U. S. v. Linn*, 15 Pet., 290.

He was thereafter discharged without cause by one having no authority to oust him, and this in direct contradiction of an explicit charter provision. The effort to oust him was a nullity, and his salary being an incident of the office, his right to the emoluments did not depend on the performance by him of official service.

The defendant alleges that by the very nature of the organization of the police force plaintiff could have no successor in office. The contention of the city that he should first have brought a proceeding to oust his successor is therefore without merit.

The salary being an incident to the office and the failure on the part of plaintiff to perform official duty being the fault of the defendant, his engagement in other pursuits did not affect his right to recover.

We are of the opinion the judgment should be affirmed and it is so ordered.

*Affirmed.*

Writ of error refused.



## CITY OF HOUSTON V. W. S. JOHNSON

Decided March 3, 1904.

**Policeman—Discharge—Salary.**

The cases of *City of Houston v. Estes*, ante, p. —, and *City of Houston v. Lubbock*, ante, p. —, followed and control this case.

Appeal from the District Court of Harris. Tried below before Hon. Wm. P. Hamblen.

*T. H. Stone*, City Attorney, for appellant.

*Wilson & Jackson* and *Lock McDaniel*, for appellee.

GILL, ASSOCIATE JUSTICE.—This is also a companion case to that of *City of Houston v. Estes*, this day decided by the court. The pleadings and facts are identical except for the difference in the dates of appointment and discharge. The same points are urged for reversal except that in this case the facts do not present the issue of service as special policeman subsequent to the attempted discharge, and that the question of the right to recover interest under the pleadings is presented here as in *Lubbock's* case (also this day decided).

In this case also the judgment was limited to the salary and interest for the two-year term.

We are of opinion the facts support the judgment, and following *City v. Estes* and *City v. Lubbock*, supra, the judgment is affirmed.

*Affirmed.*

Writ of error refused.



## CITY OF HOUSTON v. LUBBOCK.

Decided March 3, 1904.

**1.—Policeman—Term of Office—Discharge—Salary—Case Followed.**

The case of *City of Houston v. Estes*, ante. p. —, is followed and controls this case.

**2.—Interest—Pleading.**

Interest which is the legal consequence of the debt or obligation sued on may be recovered though not claimed in the petition. *Hipp v. City of Houston*, 30 Texas Civ. App., 573.

Appeal from the District Court of Harris. Tried below before Hon. Wm. P. Hamblen.

*T. H. Stone*, City Attorney, for appellant.

*Wilson & Jackson* and *Lock McDaniel*, for appellee.

GILL, ASSOCIATE JUSTICE.—This suit was brought by appellee to recover of the city of Houston \$4550 alleged to be due him for salary as policeman of the city from May 20, 1898, to the date of the trial.

From a judgment for \$2085.42 rendered by the trial court sitting without a jury the city has appealed.

The case is a companion of *City of Houston v. Estes*, this day decided by this court, and the pleadings and facts are identical except that in this case the plaintiff was appointed March 30th and was discharged by the marshal May 20, 1898, and that in this case the plaintiff is not alleged to have accepted any other appointment.

The same questions are made as in the *Estes* case except that in this case appellant contends that the court should not have allowed plaintiff to recover interest as the petition contained no prayer for such relief. Because of the similarity of the cases we do not deem it necessary to state the pleadings and facts with particularity as was done in the *Estes* case.

The plaintiff was appointed and qualified as alleged, entered upon the duties of his office and served until May 20th, when he was discharged by the marshal without charges or cause. The court limited his judgment to salary for a two-year term and interest. We find the judgment is fully sustained by the record.

The assignment complaining of the judgment for interest can not be sustained. The facts were set out in the pleading and there was a prayer for general relief. *Fort Worth & D. C. Ry. Co. v. Greathouse*, 82 Texas, 104; *Hipp & Key v. City of Houston*, 71 S. W. Rep., 39, 30 Texas Civ. App., 573.

Following *City v. Estes*, supra, the judgment is affirmed.

*Affirmed.*

Writ of error refused.



## GALVESTON, HOUSTON &amp; HENDERSON RAILROAD COMPANY v.

ELIZABETH LEVY ET AL.

Decided March 4, 1904.

**1.—City Ordinance—Construction—Sounding Signals.**

Article 453 of the ordinances of the city of Galveston, providing that it shall be the duty of those in charge of an engine in motion within the corporate limits "to cause the engine bell to be rung continually, and the whistle to be sounded at every street crossing," construed as requiring the bell to be rung continually while the engine is in motion regardless of whether or not it is at a street crossing.

**2.—Wharf—Abutting Street—Signals at Crossings.**

Where a street abuts against a wharf upon which trains are operated, that part of the wharf at which the street abuts and which is used by the public as a highway is a prolongation of such street and the same diligence in giving signals, etc., is necessary as at any other street crossing, regardless of the ownership of the wharf.

**3.—Negligence—Signals—Question of Fact.**

Though the omission of crossing signals required by statute or city ordinance may be negligence in law only with respect to persons using the crossing, circumstances may make it a question of fact whether the omission was negligence as to persons rightfully on the tracks at other points.

**4.—Charge—Evidence Presenting Issue.**

A charge instructing the jury that "deceased in the discharge of his duties had a right to be upon the cars and track of the defendant company \* \* \*" can not be assailed on the ground that the issue of whether deceased was in the discharge of his duties was not presented where the evidence showed that he was an inspector of customs and that he had started across the track to inspect a car of rails which had been loaded for shipment when he was killed by defendant's train.

**5.—Negligence—Charge—Duty to Keep Lookout.**

Deceased, in the discharge of his duty, was attempting to pass through a space between two cars standing on the track when he was caught and killed by the cars being pushed together for the purpose of making a switch. A charge that defendant would be liable for damages if the jury believed that the employes failed to have a lookout to discover and prevent injury to persons on the track can not be construed as requiring the company to station a man on the end of the car which struck plaintiff, but simply required the use of reasonable care in keeping a lookout to prevent injury to persons who might go on the track after the cars were put in motion; nor was it relieved from such duty by having sent a man to see if the track was clear before putting the cars in motion.

**6.—Requested Charge—Refusal—Contributory Negligence.**

It is not error to refuse a requested special charge upon contributory negligence where the same issues have been sufficiently presented in the main charge.

Appeal from the District Court of Galveston. Tried below before Hon. Frank M. Spencer.

*Baker, Botts, Baker & Lovett, Terry, Cavin & Mills. and Davidson & Lovenberg, for appellant.*

*James B. & Chas. J. Stubbs, for appellee.*

PLEASANTS, ASSOCIATE JUSTICE.—Appellees, the surviving wife and minor children of Alphonse Levy, deceased, brought this suit against the appellant to recover damages for the death of said Alphonse Levy, which is alleged to have been caused by the negligence of the ap-



pellant. The petition alleges in substance that Alphonse Levy, while in the discharge of his duties as customs inspector at the wharf of the Galveston Wharf Company in the city of Galveston, was crushed between two cars on a track of appellant's railroad situated upon said wharf; that said cars had been placed by appellant upon said track to be loaded with railroad iron and had remained stationary for several hours; that when placed upon the track for the purpose of being loaded an opening had been left between them for the purpose of enabling those engaged in loading them or in inspecting the iron placed thereon to pass from one side of said track to the other; that attached to one of said cars there was a number of empty box cars extending in a western direction for a distance of about 200 feet; that just as deceased, in the discharge of his duties, was in the act of passing through the open space between said cars before mentioned the defendant without giving any warning suddenly put the cars to the west of said open space in motion and thereby caught and crushed deceased between said moving cars and the car east of said open space, and inflicted injuries upon him which resulted in his death; that said cars were put in motion by an engine which came down said track from the west without giving any signals or warnings. The negligence alleged consisted in the failure of appellant's employes operating said engine to blow the whistle and ring the bell thereon as required by the statutes of the State and the ordinances of the city of Galveston; in the failure of said employes, in view of the noise and confusion existing upon said wharf and incident to the work of unloading railroad iron from a ship and reloading same upon cars and the consequent difficulty of hearing the noise of a moving train, to send some person ahead of said train to notify those engaged about said track of its approach, and the further failure to have a man stationed as lookout on the end of said cars before same were moved to warn those who might be crossing the track.

The defendant answered by general demurrer and special exceptions, and by general denial and a plea of contributory negligence on the part of the said Levy. This plea was as follows: "That if the said Alphonse Levy received the injuries in said petition set forth, then said injuries were caused by his own recklessness and contributory negligence, and without which said injuries would not have been received. That prior to and just before the time said Alphonse Levy was injured there were two cars standing on the railroad track very close together, with hardly sufficient space to permit the passage of the said Levy. That the said Levy went between the said cars knowing, or by the exercise of ordinary care, or the exercise of the slightest care, could have known, that said cars were then being switched; yet he, the said Levy, not for any business that he was engaged, but for his own private convenience and comfort, went between them and received the injuries from which he died, and which act and conduct was gross negligence on the part of the said Levy, and that his injuries were caused with-



out any negligence on the part of this defendant or its servants or employees.

"That before and at the time said Alphonse Levy was caught between said cars, the engine and cars which backed against them were being moved very slowly, and said train and cars were being handled and operated by defendant and its servants in a careful and prudent manner.

"That the said Alphonse Levy not only could have known, by the exercise of the slightest care, before he went between said cars, that said other cars were approaching or backing, but did actually know, before he went between them, such to be the fact, and that the cars between which he was injured were then to be switched or moved.

"That said defendant, although operating said cars and train carefully, did not know and could not have known that the said Alphonse Levy had placed himself in a dangerous condition where he was injured."

The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiffs for the aggregate sum of \$4875. The evidence in the record both upon the issue of the negligence of the appellant and the contributory negligence of the deceased is sharply conflicting, but the evidence introduced by plaintiff is sufficient to sustain the allegations of the petition that appellant's employees operating said engine failed to ring its bell before putting the engine in motion or during the time it was moving and before it struck the deceased; that at the time he was struck the deceased was passing through the open space between said cars which had been left open for the purpose of allowing such passage, and that the failure to ring said bell and thus warn deceased of the movement of the cars was the proximate cause of his death.

Article 453 of the ordinances of the city of Galveston is as follows: "It shall be the duty of the engineer, or other person in charge of a locomotive or engine, to cause the engine bell to be rung continually, and the whistle to be sounded at every street crossing whilst the engine and cars are in motion within the corporate limits; and any person who shall violate any of the provisions of this article shall be deemed guilty of an offense, and shall be fined by the recorder in any sum not less than five nor more than one hundred dollars." This ordinance was introduced in evidence by the appellees.

Twentieth Street, which is one of the public streets of the city of Galveston, abuts against the plank wharf of the Galveston Wharf Company just west of the string of cars which extended west from the open space in which deceased was caught and killed as before stated. Just before attaching itself to the said cars the engine with four cars in front of it was west of said street, and the undisputed evidence shows that when it moved the cars in front of it across said street for the purpose of attaching them to the cars on the east of the street the engine whistle was not blown. This movement of the cars was for the



purpose of removing three cars which were on the track east of the open space in which deceased was killed, and had been loaded with railroad iron, and replacing same with empty cars to receive the remainder of said iron. This switching of the cars was undertaken at the request of the foreman in charge of the work of loading said railroad iron upon cars for the purpose of shipment, which request had been made to appellant's agent some time before the engine was sent to do said switching. At the time the movement of the cars which struck deceased was made railroad iron was being unloaded from a ship and thrown upon the wharf, and the falling of said iron upon the plank wharf created a great deal of noise. This noise was not continuous but occurred at intervals of a few minutes. Before starting across Twentieth Street to make said switch the engineer sent a brakeman down said wharf to the cars which were to be removed to notify those engaged in loading said cars that a switch was to be made, and to see that everything was clear. This brakeman did notify the foreman and others engaged in the work of loading said cars that the switch was about to be made, and as soon as said workmen had gotten off the cars and removed the appliance used by them in loading same the brakeman signaled the engineer to go ahead with the movement of the train, and in obedience to said signals the movement was made which resulted in the death of the deceased. The evidence as to whether deceased heard, or could have heard, the notice given to the brakeman was conflicting, and the finding of the jury that he did not hear such notification given, and did not know and could not have known by the use of ordinary care at the time he went between said cars that said switch was about to be made, is sustained by the evidence.

The evidence introduced by the defendant raised the issue of contributory negligence on the part of Levy in each of the particulars mentioned in the answer above set out.

The first assignment presented in appellant's brief complains of the ruling of the trial court in not sustaining defendant's objection to the introduction in evidence by the plaintiffs of the ordinance of the city of Galveston above set out. The objection urged to the introduction of this evidence was that the ordinance only required that the bell of the engine be rung and the whistle blown at street crossings, and the uncontradicted evidence in this case showing that the deceased was not killed at or near a street crossing, said ordinance was immaterial and irrelevant.

Neither of the assumptions of fact on which this assignment is based can be sustained and the assignment is therefore without merit. As we construe the ordinance it requires that the engine bell be rung continuously while the engine is in motion within the corporate limits of the city of Galveston. This construction of the ordinance renders it admissible upon the issue of negligence on the part of appellant in failing to ring the engine bell regardless of whether the deceased was killed at or near a street crossing. We are further of opinion that



the undisputed evidence shows that the public highway near which deceased was killed, and across which appellant moved its cars just before deceased was struck, was a part or prolongation of the street of the city of Galveston known and designated as Twentieth Street. All of the witnesses who testified as to how the movement of the cars was made said that the engine was on the west side of Twentieth Street when it started to make the switch. The engineer and fireman speak of the Twentieth Street crossing, and the latter says that the reason he did not blow the whistle for said crossing was because he had stationed a brakeman there to keep a lookout and warn persons who might be using the street. It was further shown that the street at this place was used by the public as a thoroughfare. The only testimony tending to contradict all of this evidence was the statement of one of the witnesses for the appellant to the effect that ground at said crossing had been made by the wharf company by solid filling. This fact could not destroy the public character of the highway and render inapplicable the ordinances of the city passed for the purpose of protecting the public in the use of such highway.

The next assignment assails the ruling of the trial court in sustaining the objection of plaintiffs to testimony offered by defendant to show that the city of Galveston recognized the ground upon which the crossing in question was situated as the property of the wharf company and had never improved or taken charge of that portion of Twentieth Street. We think this testimony was immaterial and therefore was properly excluded. It matters not who owned the land upon which the street or highway was situated or whether the city had ever improved that portion of said street. It was in fact a public highway, so used by the public and recognized as such by the appellant's employes who operated its trains, and as long as the wharf company permitted it to be so used it was a part of Twentieth Street in said city in the sense in which that term is used in said ordinance. While considering the questions raised under the assignments above referred to we will also dispose of the assignments which assail the charge of the court in instructing the jury that the failure of appellant's employes operating said engine to ring the bell thereon continuously while said engine was in motion would be negligence under the ordinance above set out, and that if they believed from the evidence that said bell was not rung and that the failure to ring same was the proximate cause of the death of Alphonse Levy, he not being guilty of contributory negligence, they should find for the plaintiff; and further that if the jury believed that the whistle of said engine was not blown at the crossing of Twentieth Street and the failure to blow same was negligence and proximately caused the death of Levy, without any contributory negligence on his part, they should find for the plaintiffs. Under our construction of the ordinance it was the duty of the operatives of said engine to ring the bell thereon continuously while the engine was in motion within the limits of the city of Gal-



veston. It follows that the failure to ring said bell being contrary to the statute would be negligence per se, and the court did not err in so instructing the jury.

The court did not instruct the jury, as contended by appellant, that the failure to blow the whistle at the crossing of Twentieth Street would be negligence per se, but expressly left the issue of negligence vel non arising from the failure to blow the whistle to the determination of the jury. While the statutory signals required to be given by railroads at public crossings for the purpose of using them, and the failure to give such signals would be negligence per se only in respect to such persons, such failure might under some circumstances be negligence in respect to persons other than those above mentioned. In the case we are considering appellant's employes knew that they were going to push a number of box cars into a public place where a number of persons were at work and were passing to and fro across its track. Just before reaching the place at which these persons were at work the train crossed a public street at which the statute required the whistle of the engine to be blown. There was much noise and confusion at the place where the deceased was engaged incident to the character of the work in progress, and the ordinary noise made by a moving train might not be readily heard and recognized by those near the place at which the work was being done. Appellant's employes operating said train were, under the evidence, charged with knowledge of these facts, and were further charged with notice of the fact that the persons upon or about said track at or near the place said work was in progress had no reason to expect that the train would cross the street and move on to said place without giving the signal required by the statute. If the whistle had been blown at the crossing of Twentieth Street the deceased would have heard it and would have been thereby notified of the approach of the engine and in all reasonable probability he would not have been struck by the train. Under these facts it can not be said, as a matter of law, that ordinary care on the part of the operatives of said train did not require them to blow the whistle before crossing Twentieth Street, and the trial court properly submitted to the jury the question of whether the failure to blow the whistle was negligence. It does not follow that because the failure to blow the whistle is negligence per se only as to those persons for whose benefit the statute was enacted, that such failure can not under any circumstances be negligence as to any other persons. *Railway Co. v. Gray*, 65 Texas, 32; *International & G. N. Ry. Co. v. Woodward*, 26 Texas Civ. App., 389, 63 S. W. Rep., 1051; *Missouri K. & T. Ry. Co. v. Taff*, 7 Texas Ct. Rep., 384; *Gulf C. & S. F. Ry. Co. v. Matthews*, 28 Texas Civ. App., 92, 66 S. W. Rep., 588; *Gulf C. & S. F. Ry. Co. v. Calvert*, 11 Texas Civ. App., 297, 32 S. W. Rep., 246.

In the third paragraph of his charge the trial judge instructed the jury that "Alphonse Levy, deceased, in the discharge of his official



duties had the right to be upon the cars and track of the defendant company, but the law imposed upon him the use and exercise of ordinary care, as hereinbefore defined, to prevent injury to himself."

Under appropriate assignments of error this charge is assailed upon the ground that there is no evidence presenting the issue of whether the said Levy at the time he went upon appellant's track and received the injuries which resulted in his death was in the discharge of his duties. The evidence shows that Levy was an inspector of customs in the employment of the government, and it was his duty to count and inspect the railroad irons which were being loaded on the cars for the purpose of shipment. While the evidence shows that the three cars which were about to be switched had been loaded and inspected and a manifest therefor given by Levy before the switch was attempted to be made, there is also evidence to the effect that another car on the track east of the loaded cars had not been inspected by Levy, and that he had started to cross the track in the open space in which he was caught and killed for the purpose of going to said car and inspecting the iron that had been placed thereon. This evidence clearly raised the issue of whether Levy was in the discharge of his official duties when he went upon defendant's track, and the objections made to the charge can not be sustained.

The eleventh assignment of error complains of the following paragraph of the charge:

"1. The court erred in charging the jury that if they believed from the evidence that the employes of defendant company failed to have a lookout to discover and prevent injury to persons on the track, and that the said failure was negligence, and the proximate cause of Alphonse Levy's death, and that his death would not have occurred but for said employes' negligence in that respect, then the jury should find a verdict for the plaintiffs."

The objections urged to this charge are (1) that it presents an issue not raised by the evidence, in that the uncontradicted evidence shows that one of the brakemen who was engaged in making said switch went upon and along the track where Levy was killed a short time before the switch was made, for the purpose of ascertaining if the persons engaged about said track were out of danger, and that the switch was not attempted to be made until said brakeman had performed the duty assigned to him and had signaled the engineer that the track was clear; and (2) that by said charge the jury are instructed that it was the duty of appellant to have had a person standing on the end of the car which struck the deceased for the purpose of keeping a lookout, when the uncontradicted evidence shows that the car which struck Levy had been stationary for hours before it was pushed against him and was not connected with a moving train until just at the moment it struck deceased, and therefore no duty devolved upon the appellant to have a man stationed as a lookout upon the end of said car.



We do not think the sending of a brakeman down the track to see that the same was clear before the switch was made relieved the operatives of the engine from the duty of keeping a reasonable lookout while the engine and train were in motion for the purpose of preventing injury to any person who might go upon the track. The charge complained of does no more than submit to the jury the issue of whether the operatives of the train failed to keep a reasonable lookout to prevent injury to persons who might be upon the track, and whether such failure, if any, was negligence, and the jury must have so understood the charge. There is nothing in the language used which would have led the jury to believe that it was the duty of the defendant to have a man stationed on the end of the car which struck the deceased for the purpose of keeping a lookout. *Gulf C. & S. F. Ry. Co. v. Smith*, 87 Texas, 357; *Texas & P. Ry. Co. v. Watkins*, 88 Texas, 24; *Texas & P. Ry. Co. v. Staggs*, 90 Texas, 458; *International & G. N. Ry. Co. v. Lee*, 34 S. W. Rep., 161; *Railway Co. v. Jacobson*, 28 Texas Civ. App., 150, 66 S. W. Rep., 1111.

The thirty-second assignment of error complains of the refusal of the trial court to give the jury special charge number 16 requested by the defendant, said charge being as follows:

"You are instructed that if you believe from the evidence that Alphonse Levy went upon the track between the cars for the purpose of urinating, and that a person of ordinary prudence, situated as he was at the time, would not have done so, and that if he had not done so he would not have been injured, then you will find your verdict in favor of the defendant, no matter whether the defendant was negligent in any and all of the particulars alleged in the petition or not."

The court in the main charge gave the jury a correct definition of contributory negligence and further instructed them as follows: "If the jury believe from the evidence that Alphonse Levy by being between the cars at the time of his death was guilty of contributory negligence, your verdict should be for the defendant. \* \* \* If the jury believe from the evidence that Alphonse Levy knew, or by the exercise of ordinary care and caution could have known, that a switch was about to be made and nevertheless went upon the track where he was killed, your verdict should be for the defendant."

At the request of defendant the following special charge was also given: "Even though you may believe from the evidence that the defendant railroad company failed to blow the whistle, or ring the bell, at what is described in the evidence as the Twentieth Street crossing, or failed to have a man stationed as lookout on the end of the backing train of cars, yet if you believe from the evidence that a man of ordinary care and prudence, situated as the deceased Alphonse Levy was, and under the circumstances then existing, would not have gone between said cars, or if you believe that an ordinarily prudent person, under the same or similar circumstances, by the exercise of such faculties as such a person would have exercised under the same or similar



circumstances, would have known that going between said cars was hazardous, and would not have attempted it, then you will find for the defendant."

These charges sufficiently presented to the jury the issue of contributory negligence raised by the pleadings and evidence and it was therefore not error to refuse requested instruction number 16 above set out. The purpose for which Levy went upon appellant's track could not of itself affect the question of his contributory negligence. If he were a trespasser upon the track the duty owed him by the appellant would not be the same as that which it would owe to one rightfully upon its track, and the purpose for which he went upon the track might be considered in determining the appellant's duty to him, but the requested instruction only informed the jury that they might consider the purpose for which Levy went upon the track in determining the question of his contributory negligence, when, as before stated, it could in no way affect that question.

We deem it unnecessary to consider the remaining assignments of error in detail. After a careful examination of the record we have reached the conclusion that the evidence sustains the verdict of the jury and that the charge of the trial judge is a clear and comprehensive presentation of the law applicable to the facts in evidence. The numerous special charges requested by the defendant which contain correct statements of the law applicable to the facts were covered by the main charge given by the court and no error is shown in the refusal of any of said charges. We are of opinion that the judgment of the court below should be affirmed and it is so ordered.

*Affirmed.*

Writ of error refused.



GULF, COLORADO & SANTA FE RAILWAY COMPANY v.  
J. M. MILLER.

Decided March 5, 1904.

**1.—Contributory Negligence—Walking on Track—Failure to Observe Engine.**

Evidence that plaintiff, who went upon a railway track and walked on it about twenty steps, did not observe an engine standing on the track near a depot some 800 feet away, facing toward him and in the direction in which he turned and walked, with his back to it, does not show that he was guilty of contributory negligence in so doing, as a matter of law and over the verdict of a jury to the contrary.

**2.—Discovered Peril—Issue Raised.**

Evidence that before a slowly moving engine struck plaintiff, and in time to have given him warning, the fireman was standing up in the engine looking south, the direction the engine was moving, raised the issue of discovered peril and required a charge thereon.

**3.—Evidence—Opinion.**

Under the rule allowing witnesses to state the appearance of things coming under their observation it was permissible for a witness to state that he could not say who the fireman in an engine was looking at just before the engine struck plaintiff, "but he looked to me like he was looking at plaintiff."

**4.—Railroads—Personal Injury—Engine Operated by Another Company on Defendant's Track.**

The court did not err in charging the jury to disregard the fact that the engine which struck plaintiff was owned and operated by a company other than the defendant, where it was operated on defendant's track by its permission and under orders from its office.

Appeal from the District Court of Cooke. Tried below before Hon. D. E. Barrett.

*J. W. Terry and Ballinger Mills*, for appellant.

*R. H. West and Stuart & Bell*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—On the former appeal in this case the judgment was reversed because the verdict was clearly against the evidence on the issue of contributory negligence. 30 Texas Civ. App., 122, 70 S. W. Rep., 25. We were then of opinion, that is, the majority of the court as then constituted, that appellee, according to his own version of the accident, was inexcusably at fault in undertaking to walk on a railway track in front of an engine without taking any notice of it, although it was in plain view, until it had knocked him off. The engine was at or near the depot at Daugherty, I. T., heading towards appellee, when he stepped upon and walked down the track some twenty steps with his back towards the engine. The only excuse offered for his conduct was that a train from the opposite direction was expected about that time, and he did not look towards the depot for a train because he was not expecting one from that direction, although he did see that none was within thirty or forty steps of him when he got on the track. The same excuse was offered on the last trial for his not seeing the engine before it struck him, to which he added the following: "This accident had an effect on my memory;



that is why I won't be positive as to how far I looked up the track. I saw no train moving in that direction when I looked up. If the train had been moving I would have noticed it, but standing still it didn't attract my attention. I certainly would have seen a moving train between where I went on the track and the depot, if there had been one." He was about 800 feet south of the depot when he stepped on the track, and looked north, towards the depot, as he passed around in front of the train on the side track. At least the evidence warranted this inference. The circumstances surrounding appellee clearly warranted him in concluding that a train from the south was then about due. The evidence also tended to prove and warranted a finding that the engine was standing still at the depot when appellee stepped on the track. Now if it be true, as he in effect testified on the last trial, that he looked sufficiently to see a moving train and failed to notice the engine because it must have been standing still at the depot, several hundred feet away, can we say that a person of ordinary prudence under the same circumstances would not have entered upon and walked a few steps down the track as he did without apprehending danger? We hardly think so. The evidence warranted the inference that he was just about to leave the track when he was struck. Reasonably believing that no train nor engine was likely to be moving between him and the depot at that time and seeing that none was in motion in that direction, we can not say that appellee was clearly negligent in assuming that he might safely walk down the track some twenty steps.

The issue of discovered peril was distinctly and affirmatively raised by the pleadings and evidence and submitted in the charge on the last trial, and we do not feel warranted in disturbing the verdict on that issue. According to the testimony of the engineer, conductor and fireman on the engine which struck appellee, the collision took place before any of them saw him, and just as he stepped upon the main track in front of the engine after crossing a side track in front of a long train standing thereon and so situated as to obstruct their view of him until he was right at the main track. Clearly their evidence did not raise the issue. But the testimony of appellee and one M. L. Miller, who seems to have been a vigorous witness for him, if accepted as true by the jury, not unreasonably, perhaps, raised the inference that at least the fireman, who was on the side of the engine next to the side track, must have seen appellee before he was struck and in time to have given him warning. M. L. Miller testified: "I saw the fireman standing up in the engine, looking south, just prior to the engine hitting plaintiff. I could not and did not see the engineer. I could not say who the fireman was looking at, but it looked to me like he was looking at Miller. At the time I saw the fireman looking south as aforesaid, as near as I can come to it, the engine was from sixty-five to ninety feet from Miller, the plaintiff." It was noonday, and if appellee walked twenty steps or more at a moderate gait along the



track in front of the engine, as his own testimony and that of M. L. Miller tended to prove, it seems that some of those operating the engine, which according to their testimony was not traveling very fast, ought to have seen him before overtaking and running over him.

It is, however, insisted that the court erred in permitting M. L. Miller to testify, "I could not say who he was looking at, but he looked to me like he was looking at Miller," over the objection that the same was the opinion and conclusion of the witness. But we think the evidence comes within the familiar rule allowing witnesses to state the appearance of things coming under their observation.

The objection to the evidence quoted under the seventeenth assignment seems to be met by the statement in appellee's reply to this assignment.

The court did not err in charging the jury, in effect, to disregard the fact that the engine which struck appellee was owned and operated by the Atchison, Topeka & Santa Fe Railway Company, since it was operated on appellant's track by its permission and under orders from its office at Cleburne, Texas.

Nor did the court err in charging on the burden of proof as to the issue of contributory negligence, since the charge is analogous to one approved by the Supreme Court in *Gulf C. & S. F. Ry. Co. v. Howard*, 96 Texas, 582, 75 S. W. Rep., 805. See, also, *Railway Co. v. Buie*, 32 Texas Civ. App., —, 73 S. W. Rep., 853. No other objections to the charge seem to require notice.

The evidence clearly warranted a finding that those operating the engine which so seriously injured appellee were guilty of negligence in not warning him of its approach, and did not clearly require a finding that he was guilty of contributory negligence. Probably, also, it warranted a finding that the men on the engine discovered appellee's peril in time to have warned him and that they neglected to do so. We have been slow to reach this and the next preceding conclusion, but have finally determined that we would probably invade the province of the jury were we to set this verdict aside.

The judgment is therefore affirmed.

*Affirmed.*

Writ of error granted; judgment affirmed.



## FORT WORTH &amp; DENVER CITY RAILWAY COMPANY v. J. P. WYATT.

Decided March 5, 1904.

**Contributory Negligence—Crossing Railroad Track—Failure to Look.**

Where the uncontradicted evidence showed that plaintiff, who was blind in his right eye, did not stop and look before crossing a railroad track, and was struck by a moving car then being switched and approaching from the right-hand side, there was such proof of contributory negligence as required a reversal of the judgment in plaintiff's favor. *Gulf C. & S. F. Ry. Co. v. Holland*, 27 Texas Civ. App., 397, and *Texas Midland Ry. Co. v. Crowder*, 25 Texas Civ. App., 536, distinguished.

Appeal from the County Court of Clay. Tried below before Hon. James F. Carter.

*Stanley, Spoons & Thompson and Marshall Spoons*, for appellant.

*W. T. Allen*, for appellee.

**SPEER, ASSOCIATE JUSTICE.**—This is a suit for personal injuries, instituted in the County Court of Clay County by J. P. Wyatt, against the Fort Worth & Denver City Railway Company, which resulted in a judgment in favor of said Wyatt in the sum of \$330. The contested issue seems to be that of the contributory negligence of the appellee. As bearing upon this issue we quote his testimony: "I started to go to Windthorst, and as I was going out of town I came to where the street I was traveling turns across the defendant's railroad tracks. I do not know how many tracks there are here at this crossing, but it seems there were several. The first track I came to had several box cars standing on it southeast of and up to the crossing. This track ran southeast from the crossing, and joined on to another track which ran north and south. When I got to this first track I looked down the track and saw an engine standing on the track running north and south; the engine was headed south. I drove on across this track and to another track a short distance, I don't know just how far, but it seemed only a few steps; and just as I drove up on this second track my horse shied off to the left and I struck him with the lines and turned my head around to the right and saw a detached car right up in four or five feet of me, coming toward me. The car struck my buggy in a moment after I saw it and crushed the wheels, and it dropped down on the track, and was pushed along on the ground several feet until this moving car struck and coupled with another car standing still on the track. \* \* \* At the time of the injury, and while I was approaching the crossing, there was no whistle blown or bell rung, and no signal or warning of any kind given that a car was approaching the crossing. I am blind in my right eye, and the car came up on the right side, and I did not hear it or see it until my horse shied off, and I turned my head around and saw the car with my left eye. I did not see any engine



moving as I approached the crossing, nor did I hear any engine. All the engine I saw was the one standing still down on the main track just before I started across. I don't know whether this is a street or not that crosses these tracks at this crossing. It is where one of the most public streets in Wichita Falls turns and crosses the tracks and seemed to be traveled a great deal. \* \* \* My horse shied off to the left, which was in the opposite direction from which the car came. I am blind in my right eye, the one that was in the direction from which the car came. I can see all right with my left eye; my hearing is also good. I did not turn my head around and look up the track in the direction from which the car came after I crossed the first track and before the second track was reached; if I had I could have seen the car before I drove on the track. I did not hear the car make any noise, and if it had been making much noise I think I would have heard it. There was nothing to have prevented me from seeing the car before I drove on the track if I had turned my head and looked. If I had seen or heard the car before going on the track I would not have gone upon it till the car had passed. There was nothing to obstruct my view of this track after I crossed the first track; that is, there was nothing to obstruct my view of the car on the second track before I drove on the track. That track itself being at a public crossing is about level with the ground."

A witness for the defendant testified that the distance from the crossing of the public road on the elevator track and the crossing on the mill track, where appellee received his injuries, is about 100 feet or a little more; that he stepped it and it was thirty-four steps. Several other witnesses testified, as did appellee, that there was nothing to obstruct the view of appellee of the approaching car after he had crossed the first track, if he had turned his head and looked. The evidence seems to be uncontradicted upon this point as well as upon the other point, that appellee did not look before going upon the second track, where he was injured. In view of this testimony we can not avoid the conclusion that appellant's assignments raising the question of the insufficiency of the evidence upon the issue of contributory negligence to support the judgment should be sustained, and the judgment reversed. While we are not inclined to hold as matter of law that the facts here detailed constituted contributory negligence, yet we do think the evidence is wholly insufficient to show that appellee was free from such negligence. There are many authorities holding as matter of fact that one who goes upon a railroad track without taking the precaution to look and listen for approaching cars, and is injured by a car which he might have discovered by the exercise of such diligence, is guilty of such negligence as will preclude a recovery by him. *Galveston H. & S. A. Ry. Co. v. Bracken*, 59 Texas, 73; *Galveston H. & S. A. Ry. Co. v. Ryon*, 70 Texas, 56, and 80 Texas, 59; *Sabine & E. T. Ry. Co. v. Deane*, 76 Texas, 73; *Turner v. Ft. Worth & D. C. Ry. Co.*, 30 S. W.



Rep., 253; Gulf C. & S. F. Ry. Co. v. Miller, 70 Texas, 25; Lumsden v. Chicago R. I. & T. Ry. Co., 31 Texas Civ. App., 604, 3 Texas Ct. Rep., 169.

Much reliance is placed by appellee upon the cases of Gulf C. & S. F. Ry. Co. v. Holland, 27 Texas Civ. App., 397, 66 S. W. Rep., 68; Missouri K. & T. Ry. Co. v. Owens, 32 Texas Civ. App., —, 8 Texas Ct. Rep., 71, and Texas Midland Ry. Co. v. Crowder, 25 Texas Civ. App., 536, 64 S. W. Rep., 90, but we think these cases are clearly distinguishable from this one.

In the Holland case it appears that "when appellee (the plaintiff) started across the tracks at the point of the accident, he stopped and looked for the train, for he knew it had been switching in the yards. He then discovered that it was standing still beyond the point where the Houston & Texas Central tracks cross the appellant's tracks, and about 250 feet from the point at which the accident occurred. With reference to this appellee testified that when he looked, and saw them standing still, he thought everything was safe, and proceeded to cross at his usual gait. He did not look again, and did not hear the approaching cars." The court in disposing of the case say: "In this State the mere failure to look and listen does not, as matter of law, constitute negligence. It may be true, as found by the jury, that a person of ordinary prudence, when he looked and saw a train standing still some distance away, would have concluded that he could safely cross without exercising further vigilance. If appellee's account is true, the excessive speed of the train is responsible for the accident, for, but for this, his precaution in looking before starting to cross would have been ample protection against accident." Thus it will appear that in that case the injured party exercised the precaution of looking before entering upon the place of danger.

In the Owens case Owens, the injured party, when within 133 feet of the crossing where the accident occurred, looked for a train and saw none, although he could see as far back as 807 feet. He knew the rate of speed at which trains were permitted to run by the terms of the ordinances of the city and the rules of the company, and the rate they usually ran, and the court said that "he may have believed, and under the evidence the jury could have found, that it was not negligence on his part to fail to look again before attempting to cross the track. He was walking at the rate of three miles per hour, and had only walked 133 feet since he last looked for a train. Had not the train which injured him been running at an unusual and an unlawful rate of speed, and had not those operating the same violated the ordinances of the city and the rules of the company, in failing to ring the engine bell and keep a lookout, the accident would not have occurred." Thus, in that case it appears that the injured party did look down the track he was about to cross for a very considerable distance before placing himself in a position of danger. Besides, too,



in that case the question before the court was the correctness of the trial court's ruling in refusing to give a summary instruction to the jury to find for the defendant railroad upon this issue.

In the Crowder case a single quotation will suffice to show the distinction between that and the present case. It is there said: "While the evidence fails to definitely show that Crowder looked and listened before stepping on the track, it is not doing violence to the evidence to assume that he saw the engine and cars at the south end of the switch, and concluded that they would not be then backed down at that time, or, if so, that a proper lookout would be kept, and that proper signals would be given to warn him in time to leave the track to prevent injury." Crowder was killed by the accident, and hence the presumption indicated in the quotation.

Now in the present case it is not shown that appellee could see any portion of the mill track where the accident occurred, from the point at the elevator track where he first looked. Nor is it shown how far down the track he could see at the time he actually looked. No presumptions that he did look before going upon the mill track can be indulged, as in the Crowder case, for, as before indicated, the evidence is uncontradicted that he did not look. Moreover, he was blind in his right eye, the side from which the car injuring him approached, and this fact itself emphasizes the necessity for his exercising a somewhat higher degree of care than that to be exercised by a person not similarly afflicted. *Galveston H. & S. A. Ry. Co. v. Ryon, supra.*

It may be that appellee, upon another trial, can sufficiently explain his failure to look, but in the present state of the evidence we conclude that, as matter of fact at least, the evidence shows he was guilty of such contributory negligence as to require a reversal of the judgment.

*Reversed and remanded.*



A. B. RAY v. PECOS & NORTHERN TEXAS RAILWAY COMPANY  
ET AL.

Decided March 5, 1904.

**1.—Railroads—Fellow Servants—Contributory and Concurring Negligence.**

Plaintiff, while in the service of the Pecos & Northern Texas Railway Company and engaged in transferring a boiler from a pump house to an engine house in its yards, was injured by reason of a passing switch engine striking a plank left on a switch track by one of the crew engaged in moving the boiler. There was evidence that the foreman of such crew ordered plaintiff and others to clear the switch track, and that one of plaintiff's fellow servants failed to do so, but plaintiff testified that he did not hear the order, and was at the time with his back to the switch track, supporting some timbers with a cowbar, awaiting orders, and did not know the conditions of the track or hear the approach of the engine. Held, that the court erred in instructing a verdict for defendants on the ground of contributory negligence. If there was negligence on the part of the engine crew, who were not, under our statute, fellow servants of plaintiff, plaintiff's right of recovery would not be defeated because negligence on the part of some of the boiler crew, who were his fellow servants, also concurred in producing the injury.

**2.—Same—Railroad Jointly Using Tracks and Yard.**

That the engine causing plaintiff's injury may have belonged to and was being then operated by another railroad company, which was jointly using the switch tracks and yards of the Pecos & Northern Texas Company, would not take away the liability of the latter company for the injury, although the other company might also be liable.

Appeal from the District Court of Potter. Tried below before Hon. Ira Webster.

*L. C. Barrett and W. E. Gee*, for appellant.

*J. W. Terry, Browning, Madden & Trulove, Stanley, Spoons & Thompson*, and *J. H. Barwise*, for appellees.

CONNER, CHIEF JUSTICE.—Appellant and others in the service of the appellee Pecos & Northern Texas Railway Company were engaged in transferring a large iron boiler from a pump house to an engine house situated in the yards of the company named, in Amarillo, Texas, across a switch track extending alongside said engine house. As a roadway for the rollers upon which said boiler was moved, heavy planks were used. After crossing the switch track, which was at a right angle, one of these planks had been left on or near the rail nearest the engine house in such manner or position as that it was struck by a passing engine and appellant thereby injured.

Appellant alleged that the track and yards in question were in the common use of the said owner and of the Fort Worth & Denver City Railway Company, also sued, and that the operatives of the locomotive causing the injury were guilty of negligence in passing over the track at the time they did and in failing to discover that in so doing said plank would be struck, averring, however, an inability to prove to which company said locomotive and crew belonged.

Appellees separately answered by general denial, and that the in-



juries charged were the proximate result of contributory negligence on the part of appellant and his fellow servants in leaving said plank in position to be struck.

We are of opinion that the court was in error as assigned in giving the peremptory instruction to the jury to find for appellees. There was evidence tending to show that the foreman of the crew moving the boiler ordered appellant and others to clear the switch track, and that one of appellant's fellow servants failed to sufficiently do so. But appellant denied having heard the order, and testified that he was at the time with his back to the switch track and facing the position of the foreman, supporting some timbers with a crowbar, awaiting orders, and did not know of the condition of the track or hear the approach of the engine. If appellant was himself free from negligence, and there was negligence on the part of the engine crew, who were not fellow servants with appellant under our statute, that proximately resulted in injury, the master, whose servants the operatives of the engine were, is liable, even though there may also have been concurring and contributory negligence of persons other than appellant, fellow servants of appellant though they may have been. See vol. 2, sec. 814, of the recent work by Labatt on Master and Servant, and authorities cited in note; *Galveston H. & S. A. Ry. Co. v. Sweeney*, 14 Texas Civ. App. 216, 36 S. W. Rep., 800, in which writ of error was denied; *Railway v. Swinney*, 2 Texas Law Journal, 814, 9 Texas Ct. Rep., 228. The issue of contributory negligence should therefore have been submitted to the jury.

It is not contended, neither can it be successfully, that the mere fact that the locomotive causing the injury may have belonged to the Fort Worth & Denver City Railway Company would relieve the other appellee, if it be otherwise liable. Whether it be the locomotive of one or the other, the appellant Pecos & Northern Texas Railway Company, under the circumstances appearing in this case, is liable for the actionable negligence of the operatives thereof. *Railway Co. v. Owens*, 8 Texas Ct. Rep., 67; *International & G. N. Ry. Co. v. Underwood*, 67 Texas, 589; *International & G. N. Ry. Co. v. Moody*, 71 Texas, 614; *Missouri P. Ry. Co. v. Bond*, 20 S. W. Rep., 930. These authorities are cited as sustaining the proposition that the Fort Worth & Denver City Railway Company, which seeks to have the judgment as to it affirmed at all events, is also liable. They do not, however, seem to be precisely in point. Nevertheless, the identity of the engine and crew, in the absence of attainable positive proof, may be established by circumstances, and we think the fact that the yards and track were in the use and presumably under some degree of control on the part of the Fort Worth & Denver City Railway Company are circumstances at least tending to establish that one of its engines caused the injury, and hence, in accord with the reasoning of the cases named, perhaps



call for rebutting proof. But however this may be, the question does not seem to be very material, and further evidence of identity may be offered upon another trial, and we therefore conclude that the judgment should be reversed because of the error noted as to all parties, and it will be so ordered.

We deem it unnecessary to discuss other questions presented. The judgment is reversed and cause remanded.

*Reversed and remanded.*



CHICAGO, ROCK ISLAND & TEXAS RAILWAY COMPANY ET AL. v.  
H. H. HALSELL.

Decided March 5, 1904.

**1.—Assignment of Error to Admission of Evidence—Bill of Exceptions.**

An assignment of error to the admission of certain evidence will be overruled where the bill of exceptions taken to the action of the court in overruling objections to it wholly fails to show that the evidence was in fact admitted.

**2.—Evidence—Market Value of Cattle.**

Where a witness had testified in substance that he knew the market value of the cattle in question, stating what it was at J., the point of shipment, and also at their destination, and that in their damaged condition they were worth at destination about what they were worth at J., his statement that, "taking into consideration everything in connection with the cattle, I would say that they were damaged at least \$2.25 per head," was in effect but a short method of stating the difference in the market value of the cattle at J. and at their destination.

**3.—Parties—Railroads—Joint Shipment.**

Where judgment was had against three railroad companies for damages occurring to cattle in a joint shipment over them as connecting lines, and it appeared that one of the roads was not served with notice of the suit and did not enter an appearance, the judgment was reversed and the cause dismissed as to that defendant.

Appeal from the District Court of Wise. Tried below before Hon. J. W. Patterson.

*W. H. Lassiter, Robert Harrison and T. J. McMurray*, for appellants.

*J. M. Basham*, for appellee.

CONNER, CHIEF JUSTICE.—This suit was tried in the District Court of Wise County on plaintiff's amended petition, wherein it was alleged that the defendants, the Chicago, Rock Island & Texas Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Choctaw, Oklahoma & Gulf Railway Company were one and the same concern, and that they were, on October 14, 1902, engaged as partners in transporting freight and in operating lines of road extending from Jacksboro, Texas, to Forrest City, Ark.; that on that date the plaintiff shipped from Jacksboro, Texas, to Forrest City, Ark., 484 head of cattle, to have same fattened for market; that the cattle were negligently delayed en route and roughly handled so that the same were damaged in the sum of \$1089. The appellants, the Chicago, Rock Island & Texas Railway Company and the Chicago, Rock Island & Pacific Railway Company, answered by general demurrer and general denial, and set up that they undertook the shipment under a written contract to carry the cattle from Jacksboro to El Reno, O. T., and there to deliver the same to their connecting carrier, the Choctaw, Oklahoma & Gulf Railway Company, and that they had done this without delay or negligence; that the written contract stipulated that they should not be liable for any damages occurring beyond their own line, and that they did



not do injury to the cattle, and that if they were damaged anywhere en route, it was while they were in the hands of their said connecting line. They also deny that they were in partnership or in any way connected, except that their line of railway connected with the Choctaw, Oklahoma & Gulf Railway at El Reno. The Choctaw, Oklahoma & Gulf Railway did not answer, and no service was obtained upon it. Appellee filed a supplemental petition in which he answered that the shipment was by virtue of an oral contract without limitation of liability, and that the written contracts, if any, were executed without authority. The case was tried before the court on July 2, 1903, and judgment was rendered against all railway companies named as partners, in the sum of \$1089, from which judgment all have appealed to this court.

The first, second and third assignments of error are to the action of the court in overruling appellant's objections to certain evidence offered in behalf of appellee. As justification for overruling all of these assignments, it would be sufficient to say that the bills of exceptions wholly fail to show that the evidence objected to was in fact admitted, and therefore fail to show error. *Fields v. Haley* (Iowa), 52 S. W. Rep., 116; *Jamison v. Dooley*, 34 Texas Civ. App., —. Notwithstanding this, however, we have considered the rulings complained of and find no error therein.

Appellee testified in substance that he knew the market value of the cattle in question; that they were worth in Jacksboro \$25.25 per head, and in Forrest City, Ark., with proper transportation, \$28.50 each; and that in the damaged condition in which the cattle reached Forrest City they were worth on the market there about what they were worth in Jacksboro before shipment. We hence conclude that the statement objected to, that "taking into consideration everything in connection with the cattle, I would say that they [the cattle] were damaged at least \$2.25 per head," was in effect but a short method of stating the difference in the market value of the cattle at Forrest City in the condition in which they did arrive and in the condition they would have arrived if properly transported. See also *Missouri K. & T. Ry. Co. v. Woods*, 31 S. W. Rep., 237; *Gulf C. & S. F. Ry. Co. v. Hughes*, 31 S. W. Rep., 411; *Gulf W. T. & P. Ry. Co. v. Staton*, 49 S. W. Rep., 277.

We think the letter and card of B. F. Davis were admissible in connection with other evidence which tended to show that said Davis, with the knowledge of the companies named, acted in their joint interest and for their common benefit. This evidence, as well perhaps as other evidence, at least tended to show the joint prosecution of a common undertaking, and seems to call for refutation on the part of those who best know the facts, if no joint relation existed, which was not attempted. *Robinson v. First National Bank of Marietta*, 3 Texas Law Journal, 282, and authorities therein cited.

The evidence as a whole we think sustains the judgment to the effect that the shipment and undertaking was a joint one, and that hence



all railway companies named are liable for the negligence of each, and the evidence otherwise sustaining the material allegations of appellee's petition, the judgment is affirmed except as to the Choctaw, Oklahoma & Gulf Railway Company, as to which the judgment will be reversed and the cause dismissed, it appearing that said last named railway company has neither been served with notice of this suit nor entered an appearance herein. Ordered accordingly.

*Affirmed in part; reversed and dismissed in part.*

Writ of error granted; judgment affirmed.



## W. T. PATTON ET AL. V. MRS. NETTIE WILLIAMS.

Decided March 5, 1904.

**1.—Continuance—Application—Materiality.**

Where an application for continuance stated that "to show the materiality of the testimony of the witnesses for which this continuance is sought defendants state that they expect to prove," etc., followed by a statement of facts which on the face of the application seem to have been material, but contained no direct averment that the testimony was material, the application was properly overruled. Rev. Stats., art. 1278.

**2.—Same—Due Diligence.**

An application for continuance is defective which fails to state that the applicant "has used due diligence" to procure the absent testimony, although the facts stated may seem to show diligence.

**3.—Pleading—Stating Date—Certainty.**

A petition alleging breaches of a liquor dealer's bond as having been made "on or about the 23d day of December, 1901, and on divers days before and after said date during said month," was not subject to special exception for being too vague, indefinite and uncertain.

Appeal from the District Court of Erath. Tried below before Hon. W. J. Oxford.

*Eli Oxford and Nugent & Pannil*, for appellants.

*J. T. Daniel*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—The first requisite of an application for a continuance on the ground of the want of testimony is, that "the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof." Rev. Stats., art. 1278. The application overruled in this case did not contain the affidavit that the testimony was material, and was therefore fatally defective. The nearest approach to it was the following: "To show the materiality of the testimony of these witnesses the defendants state that they expect to prove," etc., which was followed by a statement of facts which on the face of the application seems to have been material. This suggests an evasion of rather than a compliance with the positive requirement of the statute. The same statute requires the affidavit to state that the party applying for the continuance "has used due diligence to procure such testimony, stating such diligence," and it has several times been held that an application is bad which fails to state that the party "has used due diligence," although the facts stated may seem to show diligence. *Earle v. State*, 1 Texas Law Journal, 51, 76 S. W. Rep., 207; *Railway Co. v. Hogan*, 88 Texas, 684, 32 S. W. Rep., 1035, and cases there cited. Precisely the same form of expression is used in stating these two requirements of the statute, and there is no room for a difference of construction. The cases cited and the one before us are parallel.



The petition alleging the breaches of the liquor dealer's bond declared on to have been made "on or about the 23d day of December, 1901, and on divers days before and after said date during said month," was not subject to special exception for being "too vague, indefinite and uncertain." The evidence was confined to one breach, on or about December 23, 1901.

The application for new trial on the ground of newly discovered evidence, namely, that of the bartender of appellant Patton, was wholly wanting in diligence.

The court's findings of fact were warranted by the evidence. We therefore adopt them and also his conclusions of law.

The judgment is affirmed.

*Affirmed.*



## A. SIDOTI V. RAPID TRANSIT RAILWAY COMPANY.

Decided March 5, 1904.

**Appeal In Forma Pauperis—Proof Before Trial Judge.**

Proof of inability to give security for the costs of an appeal, when made before the trial court, must be made while the court is in session, and an order or judgment should be entered of record showing that the action taken was the action of the court. Proof before the clerk, with a fiat of approval by the judge indorsed thereon, it not appearing whether this was done in term time or in vacation, is not sufficient. Rev. Stats., art. 1401.

Error from the District Court of Dallas. Tried below before Hon. Thos. F. Nash.

*M. M. Parks*, for plaintiff in error.

*Holloway & Holloway*, for defendant in error.

TALBOT, ASSOCIATE JUSTICE.—Plaintiff in error filed no writ of error bond, but undertook to perfect his writ of error to this court by filing an affidavit under the statute in lieu of such bond. Defendant in error moves to dismiss the writ on the ground that plaintiff in error's proof of his inability to pay costs or give security therefor was not made before the court trying the case, nor before the county judge of the county of his residence.

Upon an inspection of the record we find his affidavit to be in proper form and sworn to by him before the clerk of the District Court of Dallas County, Texas, on the 23d day of July, 1903, with the following certificate or fiat indorsed thereon, to wit: "A. Sidoti, plaintiff in error, having made strict proof before me of his inability to pay the costs of the prosecution of his writ of error or to give security therefor, he is permitted to prosecute the same upon the foregoing affidavit. T. F. Nash, judge presiding, before whom the case was tried."

The affidavit does not show, nor is there any evidence whatever in the record, showing, that at the time the affidavit was made or at the time the judge made the indorsement thereon above quoted, the court presided over by Judge Nash was in session. Neither does the record before us show that any order was entered upon the minutes of the court below, as the action of the court in reference to the proof made before the court of plaintiff in error's inability to pay the costs of the prosecution of his writ of error, or to give security therefor.

The statute requires a party, in order to avail himself of the privilege of prosecuting a writ of error from the judgment of the lower court without bond, to make proof of his inability to pay the costs of such writ or to give security therefor, before the county judge of the county of his residence, or the court trying the case. Rev. Stats., art. 1401. The authority to hear such proof is not conferred upon the judge who presided at the trial as a prerogative to be exercised by him by virtue



of his office, but upon the court over which he presides as the act of the court. In order to confer jurisdiction upon the appellate court, when resort is had to the benefits of this statute and the authority of the county judge is not called into requisition, the proof required must be made before the court that tried the case, and at a time when the same is in session. The action of the judge of such court, in hearing such proof at a place other than that provided by law for the holding of his court or when such court is not in open session, is without authority of law and of no effect. It has been held by this court that the judge need not be actually sitting upon the bench at the time the proof is made, but the court must be in session. *Harwell v. Southern Furniture Co.*, 75 S. W. Rep., 888. The case at bar is distinguishable on the facts from other similar cases of our courts in that in those cases the record affirmatively showed that the affidavit relied upon was simply filed with the clerk of the court, without action thereon by the judge or court, or that the action of the judge was taken in vacation. Here the affidavit was made before the clerk of the court and filed by him with the certificate of the judge indorsed thereon to the effect that the proof was made before him, but the record is silent as to whether this was done in vacation or term time.

We hold that the record must affirmatively show that the proof of inability to pay the costs of prosecuting an appeal or writ of error was made before the county judge or the court trying the case, when such court was in session, and that an order or judgment was entered of record showing that the action taken was the action of the court. *Lambert v. Western Union Tel. Co.*, 19 Texas Civ. App., 415, 47 S. W. Rep., 476.

It follows that the writ of error in this case should be dismissed, and it is so ordered.

*Dismissed.*



## CHARLES OVERTON v. McCABE &amp; STEEN.

Decided March 5, 1904.

## 1.—Judicial Notice—Common Law in the Indian Territory.

The court takes judicial notice that the common law doctrine of fellow servants obtains in Arkansas by virtue of section 566, Mansfield's Digest, and that this statute was put in force in the Indian Territory by the act of Congress passed May 2, 1890.

## 2.—Fellow Servants—Employees on Construction Train.

The engineer of a construction train, operated for the purpose of laying ties on a railroad track being constructed ahead of it as it moves along, and another employe whose duty it is to assist in unloading and laying the ties, both working under the direction of the same foreman and in the employ of contractors who have undertaken the construction work, are fellow servants while engaged in such work.

## 3.—Same—Evidence.

Evidence considered and held insufficient to show that the foreman in charge of the train gave an order to the engineer which resulted in plaintiff's injury.

Error from the District Court of Grayson. Tried below before Hon. Rice Maxey.

*Leslie & McReynolds*, for plaintiff in error.

*E. J. Smith* and *A. G. Moseley*, for defendants in error.

TALBOT, ASSOCIATE JUSTICE.—Defendants in error were engaged as partners in the construction of a line of railroad in the Indian Territory, and plaintiff in error was in their employ, assisting in laying the track. For the purpose of conveying the material to be used in laying the track, defendants in error used a train of flat cars propelled by a locomotive engine situated about the middle or near the rear of the train operated by an engineer. The front car of the train or pioneer car, as it was called, was provided with a whistle, upon which car the conductor rode and directed the movement of the train by means of the whistle. The flat cars were severally loaded with cross-ties and steel rails. There was a tramway or moving trough along the side of the train of cars about on a level with the floor of the cars, into or upon which the cross-ties would be placed, and then by means of the tramway moved to the front to be taken by laborers there and placed upon the roadbed, and then steel rails thirty feet long would be laid and spiked upon them. This being done, the road was ready to receive the train, and it would be moved forward another thirty feet upon the track just constructed, and the process of laying the ties and spiking of the steel rails repeated and the train moved forward, and so continued as the work progressed. W. E. Noble was general foreman, and Pat Cannon was plaintiff in error's immediate foreman. They were all in the employ of the common master, McCabe & Steen, and engaged in the common undertaking of constructing said line of railway. Plaintiff in error's



duties were to unload the ties and place them upon the train, and while so engaged, and while removing a tie from the pile stacked on a car, others fell upon the one he was removing and caused it to fall upon his foot, injuring it.

This suit was brought to recover damages on account of the injury sustained, and the court, after hearing all the evidence, gave a peremptory instruction to the jury to return a verdict for the defendant. Plaintiff excepted to the action of the court, and brings the case before us on writ of error.

Plaintiff in error alleged that "Foreman Noble, Pat Cannon and other employes, by means of rush orders and misdirection, caused the said flat car upon which plaintiff was at work to be suddenly and abruptly stopped with a sudden and violent jerk, so as to throw down upon plaintiff the ties piled high upon said platform and car, whereby plaintiff was bruised and the bones of plaintiff's great toe broken," etc. He further alleged that "said Noble, by his profane, loud and boisterous orders and directions to the engineer in charge of said locomotive engine, caused said engineer to become excited and confused to such a degree that said locomotive engineer caused said engine and cars thereto attached to suddenly and violently stop with such force as to precipitate said ties against and upon plaintiff as hereinbefore alleged; and that by reason of said wrongful acts and conduct on the part of said foreman Noble, Pat Cannon and other employes, this plaintiff has been and is damaged to the amount of ten thousand dollars."

It appears from the record that the trial judge held that the common law rule exempting the employer from liability for an injury to one employe occasioned by the negligent act of another, engaged in the same undertaking, was in force in the Indian Territory; and that it was established by the uncontroverted evidence that plaintiff Overton and the servants of defendants, whose negligence caused plaintiff in error's injury, were fellow servants, and plaintiff in error could not recover.

It is believed these conclusions are correct, and that the proper disposition of the case was made by the court below. The common law doctrine of fellow servants obtains in the State of Arkansas by virtue of the general laws of that State, found in section 566, *Manfield's Digest*. This statute was put in force in the Indian Territory by an act of Congress passed May 2, 1890, and the court below correctly took judicial cognizance of the same. *Apollas v. Staniforth*, 3 Texas Civ. App., 502; 1 Greenl. on Ev., sec. 490; *Badey, Admr., v. Chubb*, 16 Gratt., 284.

That plaintiff in error and the person whose negligence caused his injury were fellow servants was conclusively established by the evidence, and the court correctly declined to submit that question to the jury. The undisputed evidence shows that plaintiff in error and the engineer



operating the engine drawing the train upon which plaintiff in error was at work, or whoever caused his injury, were in the employ of the same master, engaged in the same common enterprise, and performing duties tending to accomplish the same general purpose—the construction of a railroad track. When plaintiff in error engaged to do the work assigned him in the construction of said railroad track he assumed the natural and ordinary risks incident thereto, including the risk of negligence on the part of his fellow servants. *New England Ry. Co.*, 175 U. S. Rep., 321; *Coyne v. Union Pac. Ry. Co.*, 133 U. S., 370; *St. Louis I. M. & S. Ry. Co. v. Shackelford*, 42 Ark., 417; *Houston & T. C. Ry. Co. v. Rider*, 62 Texas, 267. There is no pretense that defendants in error failed to provide reasonably safe appliances or reasonably prudent and competent fellow servants. While it is alleged that Noble and Cannon were foremen in charge of the men at work, and by means of rush orders, misdirection and profane, loud and boisterous directions, given by them to the engineer, the said engineer became excited and confused and stopped the train suddenly with a jerk, thereby causing plaintiff in error's injury, yet the evidence wholly fails to show what their duties as such foremen were, or that they or either of them had authority to direct and control said men in the performance of their work; and wholly fails to show that any such orders were given by either Noble or Cannon. The uncontradicted evidence shows that Noble was not present when plaintiff in error was hurt and knew nothing about his injury until afterwards, when he asked to be laid off. As to the conduct of Cannon, plaintiff testified, "Pat Cannon gave the orders at the time I was hurt," but the character of such orders, or the manner in which, or to whom given, or that they contributed in the slightest degree to plaintiff's injury, is not shown. There is no evidence whatever showing that Noble gave any order at the time, and the above statement of plaintiff in error is the only reference found in the record as to any order given by Cannon.

We conclude that plaintiff in error signally failed to show his right to recover, and that the judgment of the court below is the only proper judgment that could have been rendered under the law and facts, and the same is therefore affirmed.

*Affirmed.*



ELENORA D. TIETZE v. INTERNATIONAL & GREAT NORTHERN  
RAILROAD COMPANY.

Decided March 9, 1904.

1.—Railroad in Street—Nuisance—Limitation.

Recovery for permanent damages to property by the construction and operation of a railway in the street on which it abuts is barred in two years from such construction where such damages consist in the obstruction of the use of the street by such railway, or noise, smoke and vibration caused by a subsequently increased use of the track and not from a change in construction, or by diversion of surface water.

2.—Same.

Damages from such negligent maintenance of the railway embankment in a street as to obstruct, by dirt falling therefrom, the roadway beyond the limits of the embankment were not recoverable prospectively by the abutting owner at the time of the original construction, and are only barred in two years from the time such negligence caused injury, and so also as to negligent injury by the company in trimming shade trees in front of the premises, though it might trim them in a proper manner to prevent their interference with its trains.

Appeal from the District Court of Comal. Tried below before Hon. L. W. Moore.

*F. J. Maier* and *H. G. Henne*, for appellant.

*S. R. Fisher* and *N. A. Stedman*, for appellee.

STREETMAN, ASSOCIATE JUSTICE.—In this case the trial court sustained exceptions to the plaintiff's first amended original petition and the trial amendments thereto, evidently upon the theory that the cause of action alleged appeared to be barred by limitation. The petition and the amendments thereto are as follows:

"1. The plaintiff is now, and for more than thirty years has been, the owner and possessor of lot No. 275, in New Braunfels, Comal County, Texas, and said lot is a corner lot, fronting 196 feet on the southwest side of Hill Street and 98 feet on the northwest side of Cross Street. That before the value and usefulness of said lot had been destroyed and before the nuisance and destruction of Hill Street as hereinafter set forth, said lot was a valuable residence lot and a valuable business lot, situated within 300 feet of the business center of the city of New Braunfels, and said Hill Street was the widest and one of the most beautiful streets in the said city, and it extended from San Antonio Street in a southwest direction for four blocks, and was about 100 feet wide. Said street is one of the public streets of said city and was dedicated to the use of the public.

"2. That about the year 1880, the defendant wrongfully and unlawfully made an embankment in said street, the full length of said street and placed, on said embankment in said street, crossties and iron rails, so as to form railroad tracks and switches, which are not filled in between the rails, so the same can not be passed over or be used by



teams or vehicles and defeated the purpose of its dedication and which amounts to a destruction of the street. In front of the plaintiff's property, between the sidewalk and the railway embankment, the space is only ten feet wide, so that a single vehicle can barely pass through and no team or vehicle can turn around and two teams can not pass each other; said narrow pass extends for two blocks, from San Antonio Street to Church Street, and the remainder of the said two blocks distance of the said street is entirely occupied by the said embankment and railroad tracks. On the other side of said railroad there is a narrow pass from San Antonio Street southeastward for about half a block, and on said side all the remainder of said street is occupied by said railroad. The plaintiff and the public generally have been deprived of the use of the said street, and said tracks and embankments constitute a nuisance and depreciate the real and market value of her said property to the amount of \$2000, and damage plaintiff and her property to the amount of \$2000.

"3. That about a year ago, a more definite time the plaintiff can not give, the defendant changed some of its sidetracks and switches on said Hill Street, at and near the plaintiff's said property, making the said railroad with its appurtenances a public nuisance and a nuisance to the plaintiff and her property, so that since that time, which seldom or never occurred before, while operating the said street as a switchyard, the heavy locomotive engines of the defendant are standing directly in front of plaintiff's property, not more than thirty feet distant, and the said locomotives at said place move back and forth, starting and stopping heavy trains, switching cars around about, which continues night and day with short intervals of intermission. That since the said sidetracks and switches have been put into their present position, which is about a year, and which seldom or never occurred before, the said engines throw vast quantities of smoke, steam and dirt on the plaintiff's said property, and into the residences and houses situated thereon; they disturb the inhabitants in said houses on said property with loud and disagreeable noises, from the emission of steam, humming and puffing of the engines, rattling of the cars, and other sources. That from the engines starting and stopping heavy trains in front of plaintiff's said property, within thirty feet therefrom, and from the roaring and vibrating of the engines, the slamming together of the cars, and from the operation of the said switchyard generally and other acts of defendant, the earth of plaintiff's property quakes and vibrates, cracking the walls and window glasses of the buildings thereon, and rendering the property practically unfit for residence purposes, making the premises unsafe and entailing great expense in repairing the buildings and depreciating the real value and market value of the said property in the sum of \$2000, to the plaintiff's further damage in the sum of \$2000. That before the said change in the said sidetracks and switches was made, the smoke and vibrations and other annoyances on said property were very slight, engines were seldom close in front,



and the said changes caused the aforesaid injuries and damage to the said amount of \$2000.

"4. That in front of plaintiff's premises, the defendant originally constructed a stone wall for the side formation of the said embankment, so as to keep the dirt from falling into the aforesaid narrow passway. That within the last two years the defendant has thrown dirt over the said walls, and permitted the said walls to become out of repair and filled dirt over them, so that dirt falls into said narrow passway in said street in front of plaintiff's premises, which makes that passway practically impassible, and produces such mud and slush, so that the said passway can not be used for long intervals of time, even for a team to pass or to approach plaintiff's property. Said dirt mars the beauty of the said property, produces disagreeable and sickly stench, and practically destroys the use of the said narrow pass and impairs its usefulness and depreciates the real and market value of the plaintiff's property to the further injury of the plaintiff in the further sum of \$500.

"5. That during the last ten years, the defendant has permitted its ditches under its said railroad and along its said railroad on said Hill Street to become partly filled up, grown up with weeds and grass and get out of repair, which ditches are the only way for the surface water to escape. That by the construction of the said embankment and building of the said railroad tracks, the defendant had caused the surface water to flow together and accumulate on and near the premises of the plaintiff. The surface water which formerly flowed in channels and gutters down San Antonio Street and down and across Hill Street, without coming near the plaintiff's property, on account of said embankment said water accumulates in said narrow pass on Hill Street and floods plaintiff's premises, enters her house, injures and rots the foundation of her buildings and injures said premises generally, and makes them unfit for resident purposes, and defendant has wrongfully and negligently made no adequate means for the escape of said surface water, which is thus caused to accumulate, depreciates the real and market value of the plaintiff's property to the amount of \$1000, to the plaintiff's further damage in the sum of \$1000.

"6. That the plaintiff planted shade trees along her said property along Hill Street, along the edge of the sidewalk and street. After a great many years of care and attention, the said trees, which added to the beauty of the place, to some extent overcame the hideous appearance of said railroad along said place, to some extent obstructed the smoke, dirt, noises from said railroad to enter said property so readily and made said property shady and cooler, and added much to its usefulness and desirability as residence property. That in the beginning of August, 1903, the defendant, its servants and agents injured and mutilated said trees, and cut off the limbs on one side of said trees, split down the stubs of said trees in a horrible manner, so as to injure the remainder of the tree. Some limbs were partially cut and were torn down and left hanging on the trees. The aforesaid injuries and



mutilations of the said trees gave the trees an ugly, one-sided and unsymmetrical appearance which greatly injured the appearance and value of the said property; it makes the trees less dense, they give less shade, and their usefulness and value to the aforesaid property is much diminished. The splitting of the stubs of the limbs will injure the growth of said trees, and together with the one-sided cutting and mutilations aforesaid will permanently give them an ugly appearance and permanently injure said trees and their value and usefulness to said property, and depreciates the real and market value of the said property \$250, to the plaintiff's damage in the sum of \$250.

"7. Each of the aforesaid injuries to the plaintiff's property is of a permanent character and a nuisance. The plaintiff has on her said property three residences, which were there long before said railroad was built. That the wrongs of the defendant as aforesaid have made the said residences practically unfit for resident purposes. That on account of the noises, jarring, vibrations and other wrongs and annoyances aforesaid, the inhabitants can not enjoy any quiet or comfort, that they can not sleep by night, and if one gets sick, it is impossible for him to remain there, and the furniture, clothing and other property in said houses becomes dirty and ruined. All the plaintiff's damage as aforesaid amounts to \$5750."

Plaintiff's trial amendment alleges: "That the city of New Braunfels has given plaintiff and all other property owners permission to plant trees along the edge of the sidewalk and street, and the property owners in said city have planted such trees along the lines of the sidewalk and street ever since the city has been established, and the said city and its authorities never objected thereto and always knew this and acquiesced therein, and silently consented thereto. That it is a general usage and custom in said city to plant trees along the line of sidewalk and streets, which custom has been acquiesced in and encouraged by the city and its authorities and was never objected to. That by virtue of the aforesaid facts and the ownership of the property, the plaintiff has a right to plant and maintain said trees along the lines of the sidewalk and street in front of her property, and the defendant has no right to injure or destroy the same. That if the trees did need trimming to prevent interference with the defendant's property, which is not admitted but denied, defendant did not trim them with care and skill, but negligently and wrongfully injured the same.

"Plaintiff's said property is her homestead, and she resides in one of the houses on the said premises, and she has suffered all the inconveniences and annoyances alleged in plaintiff's pleadings, the same as the other inhabitants in said buildings.

"That about six or seven years ago, a more specific time plaintiff can not give, defendant placed and constructed a railroad track on said street, where no such track was before, in the same manner and to the same injury of the plaintiff and her property as alleged concerning the



other railroad tracks, which obstructed said street and destroyed and injuriously affected its usefulness as a public street, depreciating the real and market value of the plaintiff's property \$100, to her further damage in said amount."

It will be noted that a recovery is sought in said petition for several distinct items of damage, and that the petition itself characterizes each of the elements of damage as permanent, and upon that theory the depreciation in the value of the property is in each case made the measure of damages.

Some of the items stated clearly appear to be subject to the bar of limitation. It does not appear from the pleadings that the defendant had any further right to use the street adjoining plaintiff's property than such prescriptive right as would be held by a party under the facts alleged by the plaintiff. These facts, however, in our judgment show that the damages claimed in the second and third paragraphs of said petition might have been recovered in solido at the time when said railroad first occupied said street with its tracks; and that the damages claimed in the last paragraph of said trial amendment might also have been recovered at the time the alleged change was made enlarging their occupancy of said street. This is clearly the case with reference to the damages claimed in the second paragraph, and while this conclusion is not so clear with reference to the items alleged in the third paragraph, yet we have concluded that, inasmuch as the damages claimed in said paragraph 3 appear to have resulted not from a change in the location of the road itself as it is constructed next to appellant's premises, but rather from an increased use of the road as originally constructed at that place, that the permanent damages claimed in this paragraph might have been recovered by appellant at the time of the original construction of said road.

We think it is also clear that the exception should have been sustained to the items alleged in the fifth paragraph of said petition. The injuries there claimed are for permanent damages to the premises by reason of the diversion of surface water, and the allegations show that this damage occurred more than two years prior to the institution of this suit.

We are of opinion, however, that the fourth and sixth paragraphs of said amended petition, taken in connection with the allegations of said trial amendment, and also the last paragraph of said trial amendment, set up items of damage which do not appear to be barred by limitation. They appear to arise from a use of a portion of the street not acquired by appellee under its prescriptive right. The right acquired by prescription in such cases would, of course, be limited to the extent to which that right had been exercised during the prescriptive period.

The fourth paragraph shows that the damages therein claimed resulted from the occupancy and use of a portion of said street which had not been occupied by appellee for more than two years prior to the institution of this suit; and also the acts alleged to have been done in



the sixth paragraph of said petition appear to have been done within one year prior to the filing of this suit.

With reference to the cause of action alleged in said paragraph 6, we do not, of course, intend to hold that appellant would have a right to interfere with the proper exercise of such rights as the appellee may have acquired by prescription to operate its road in said street. It does not, however, affirmatively appear from the petition that the trees planted by appellant would interfere with these rights of the appellee, but the allegations present a case of unwarranted injury sustained by appellant to her property by the damage of said trees.

For the errors mentioned, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## J. F. BRINKERHOFF V. ROBERT E. GOREE.

Decided March 9, 1904.

**1.—Trust Deed—Sale—Limitation.**

A trustee may sell, under the power conferred on him by a trust deed, though the debt it was given to secure is barred by limitation, nor does such limitation bar a suit by the purchaser at such sale to recover the land. *Goldfrank v. Young*, 64 Texas, 432, and *Dimmit County v. Oppenheimer*, 42 S. W. Rep., 1029, followed; and *McKeen v. James*, 23 S. W. Rep., 676, and *Fievel v. Zuber*, 67 Texas, 275, distinguished.

**2.—Abandonment of Claim.**

Evidence considered and held insufficient to compel a conclusion that the holder of a debt secured by trust deed but barred by limitation had abandoned his claim.

Appeal from the District Court of McLennan. Tried below before Hon. Marshall Surratt.

*E. A. McKenney* and *W. L. Radney*, for appellant.

*Sleeper & Kendall*, for appellee.

**STREETMAN, ASSOCIATE JUSTICE.**—This was an action of trespass to try title, brought by appellee to recover lots 4, 5, 6, 7, 8, 9, 10, 11 and 12, block 10, Bagby addition to the city of Waco. J. F. Bagby was the common source of title. On August 20, 1892, he executed to Horace Pickett, trustee, a deed of trust to secure the payment of a note for \$3500, due three years after date, with interest, attorney's fees, etc., payable to Mrs. Annie W. Cole. The deed of trust provided for a sale by the trustee, and also authorized the appointment of a substitute trustee, in case of the failure or refusal of said Pickett to act. This deed of trust was duly recorded in McLennan County.

On June 12, 1902, Horace Pickett, the original trustee, declined to act as such, and on June 20, 1902, Mrs. Cole being still the owner and holder of said note, appointed Robert E. Goree to act as substitute trustee; and on August 8, 1902, after proper advertisement, said Goree, as substitute trustee, regularly sold said property for \$1090, and executed a proper conveyance therefor to said Mrs. Cole. On February 18, 1903, Mrs. Cole by warranty deed conveyed said property to said Goree. The foregoing facts constituted appellee's evidence of title.

Appellants relied on the following evidence: On May 5, 1900, J. F. Bagby was adjudged a bankrupt, and on May 4, 1900, R. H. Rogers was duly qualified as his trustee in bankruptcy. May 4, 1900, said R. H. Rogers, as trustee in bankruptcy of said J. F. Bagby, executed to J. F. Brinkerhoff a conveyance for said property. The evidence also showed certain payments made upon the note by Bagby and one Berlowitz, the last payment by Bagby appearing to have been made December 11, 1894.

*Opinion.*—The first assignment of error complains of the judgment in



favor of appellee because the note held by Mrs. Cole was barred by limitation at the time the sale was made under the deed of trust. It is no longer an open question in this State whether a sale can be made by a trustee who is fully authorized to do so by the terms of the instrument, after the debt itself is barred by the statute of limitations. *Goldfrank v. Young*, 64 Texas, 432; *Fievel v. Zuber*, 67 Texas, 275.

It is insisted, however, that because it was necessary for the purchaser at such sale to institute this suit in order to recover the property, that this action is, in effect, an effort to enforce through a court the collection of the barred indebtedness. This question, however, has been definitely settled in the case of *Dimmitt County v. Oppenheimer*, 42 S. W. Rep., 1029, in which a writ of error was refused by the Supreme Court. In that case, where a similar sale was under investigation, it is said:

"The fact that possession remained in the mortgagor and those holding under him does not affect the exercise of the power of sale, or the force of the trustee's deed. The case of *McKeen v. James*, 23 S. W. Rep., 461, and *Fievel v. Zuber*, are not authority for the contention of appellant that the mortgagor or his grantee in possession may, in a suit for possession, brought by the purchaser at the trustee's sale, show that the debt was barred at the time of the sale. Such rule, or any rule that would not recognize the force of the trustee's deed, would be equivalent to denying the trustee the right to execute the power. If he had power to sell, his deed operated to convey title against the mortgagor and those holding under him."

This is clearly the only correct view that can be taken of this question, and it disposes of appellant's contention under this assignment.

Under the second assignment of error, it is insisted that the circumstances and testimony in the case authorized the purchaser at the bankrupt sale to presume that Mrs. Cole had abandoned her claim under the deed of trust. It is unnecessary to determine whether under the evidence this became an issue of fact for the court to decide. We think it is quite clear that the evidence was not so conclusive as to compel the court to find that there had been an abandonment of the debt, but that his conclusion that the debt had not been abandoned is justified under the evidence in the record.

There being no error in the judgment, it is affirmed.

*Affirmed.*



## MELCHER BOSLET ET AL. V. Z. THOMAS ET AL.

Decided March 9, 1904.

**1.—Probate Sale—Description of Land Certificate.**

An order in administration proceedings for the sale of "one-third of a league of land the headright certificate of deceased" and report and confirmation of a sale of "one-third of a league of land granted to the heirs of J. R., deceased, by the board of Land Commissioners of Harrisburg County, No. 396, dated February 3, 1838," sufficiently identified the land ordered sold.

**2.—Probate Sale—Close of Administration.**

Where no order appeared closing administration, the power to make sale of property of the estate was not lost though ten years had elapsed without any order being made in the administration proceedings.

**3.—Probate Records—Certificate.**

A certificate by the clerk that a transcript from the probate records was a correct copy of all the proceedings had in the estate and entered of record in certain pages of two named volumes of the records, did not show that no other orders were made and entered.

Appeal from the District Court of Hamilton. Tried below before Hon. N. R. Lindsey.

*Main & Chesley*, for appellants.

*Eidson & Eidson*, for appellees.

KEY, ASSOCIATE JUSTICE.—This is an action of trespass to try title, involving 1476 acres of land. After hearing all the testimony the court instructed a verdict for the defendants, and the plaintiffs have appealed. The plaintiffs introduced testimony which, *prima facie*, established title in them as the heirs of Joseph Rutch, to whom the land was granted.

The defendants introduced documentary evidence relied on by them as showing that the land was sold by the administrator of Joseph Rutch, under which title the defendants claim. Counsel for appellants admit, that if the documentary evidence referred to was admissible, it established title in the defendants, and the admissibility of that testimony is the only point presented for decision. The testimony referred to consisted of certified copies of the probate records of Harris County, as follows:

"Republic of Texas, County of Harrisburg. Hon. A. Briscoe, Judge of Probate: Your petitioner, Niles F. Smith, represents to your honor that one Joseph Rutch died some time last summer, either in the month of July or August, and left unsettled business which requires the appointment of an administrator, and your petitioner further represents that there is no person in the Republic known to be entitled to the administration, except Mary Ann Foley, who is a sister to the deceased, and she refused to administer on said estate, and requests your petitioner to apply for administration. Wherefore your petitioner prays that he may be appointed administrator of the said estate, and he, as



in duty bound, will ever pray. Gayley & Birdsall, Attys. Pet'r., Niles F. Smith.

"Estate of Joseph Rutch, Republic of Texas, County of Harrisburg. Probate Court, 27th November, 1837. For the Administration. Niles F. Smith petitioned for the administration of the estate of Joseph Rutch, deceased: Ordered that notice be given to all persons interested to file objections on or before the 7th day of December, next, or the prayer of petitioner will be granted. Agreeably to the above order, notice was this day given. D. W. Clinton Harris, Clerk.

"December 12, 1837. There being no objection filed to his appointment, it is ordered by the court that said Niles F. Smith be and he is hereby appointed administrator of the estate of Joseph Rutch, deceased, with full and complete power to settle the succession according to law. The said Niles F. Smith filed his bond for \$1000 with James S. Holman security, and letters were issued according to order, said Smith always to be subject to the rules and decrees of this court. D. W. Clinton Harris, Clerk.

"January Term, 1838. Ordered that the administrator be ruled to file inventory of the property of this succession at the February term, duly attested and appraised by James S. Holman and Thos. H. Mulryne.

"February Term, 1838. Ordered by the court that the business of this succession be continued.

"March Term, 1838. The administrator appeared and filed the following inventory: An inventory of all the property, real, personal and mixed, belonging to the succession of Joseph Rutch, deceased, as accounted of by Niles F. Smith, administrator, and appraised by James S. Holman and Thomas H. Mulryne, appointed by the court of probate for that purpose, as follows, to wit:

"One-third of a league of unlocated lands amounting to one thousand one hundred and seven acres.....	\$600 00
"Three hundred and twenty acres of unlocated soldier scrip....	50 00
"Three months pay in military scrip.....	24 00

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"Amounting to .....\$674 00

"The above is a true account of the property of this succession so far as comes within my knowledge. Niles F. Smith, Administrator. Sworn to and subscribed before me, this 23d day of March, 1838. John Shea, J. P. The above is a true valuation of the property above named as made by us in pursuance of the order of the court of probate. James S. Holman, Thos. H. Mulryne, Appraisers. Sworn to and subscribed before me this 23d day of March, 1838. John Shea, J. P.

"February term, 1839. This succession having been opened in the month of November, 1837, and no settlement having been proposed, and no debts being in court, it is ordered that the bond given in favor of the judge of probates of this county in the sum of one thousand dollars, given by Niles F. Smith, administrator, with James S. Holman, secur-



ity, is the property of the heirs and that they have a right to collect it, and as no heirs are known to the court, it is ordered that W. F. Gray be appointed curator for the absent heirs, and that said bond be delivered to him so soon as he gives security in the sum of one thousand dollars for his faithful stewardship.

"The curator appointed by the court for this succession appeared before the clerk of court and took the oath of office prescribed by law as curator and filed the following bond and received letters of curatorship: 'Republic of Texas, County of Harrisburg. Know all men by these presents that we, W. F. Gray and D. W. Clinton Harris, are held and firmly bound unto Andrew Briscoe, judge of the probate court of said county, and to his successors in office in the sum of one thousand dollars good and lawful money of this republic, for the payment of which well and truly made, we bind ourselves, our heirs and administrators forever. Conditioned: That if the above bound W. F. Gray shall faithfully discharge his duties as curator for the absent heirs of the estate of Joseph Rutch, deceased, and shall pay to the order of the court aforesaid, all moneys that may come into his hands by virtue of his said office of curator, then this obligation to be null and void, otherwise to remain in full force and virtue. Witness our hands and seals at Houston, this 23d day of March, 1839. Peter Gray [L. S.] D. W. Clinton Harris [L. S.]'

"March Term, April 3, 1840. Continued to next term of court. From the minutes in chambers, June 10, 1850. It appearing to the court upon examination of the records in the matter of this estate that the order heretofore entered in said estate, to wit, at the February term, 1839, of the county court appointing W. F. Gray curator for absent heirs was illegal in that the succession was in due course of administration. It is therefore ordered, adjudged and decreed by the court that said order of appointment be and it is hereby revoked and annulled. It is further ordered that the administrator herein, Niles F. Smith, file an annual report of the condition of said estate on or before the July term next of court. And further ordered that citation issue accordingly and case continued.

"Sums issued in accordance with foregoing order and returned indorsed: 'I acknowledge service of the within writ and waive copy. June 20, 1850. James C. Walker, Attorney for Niles F. Smith.'

"Annual Report, Filed June 25, 1850. State of Texas, County of Harris. To the Hon. Chief Justice in and for said County: In answer to the writ commanding Niles F. Smith, administrator of the estate of Joseph Rutch, deceased, to make an annual return or exhibit of said estate, submits the following to the consideration of the court: That since the administration has been opened, he has paid several sums of money on account of the administration and the expenses of procuring the certificates referred to in the inventory of said estate, the vouchers for which said sums he has not now ready to be shown to the court;



further, he has done nothing in said estate; that a certificate for one-third league of land, and also a certificate for 320 acres (a bounty land claim) was all the property inventoried in said estate, and that nothing more has since come to the knowledge of this administrator, which said certificates are now ready to be shown to the court. Further he prays of the court further time to produce said vouchers and prepare an account current of said estate. As in duty. Niles F. Smith by Jas. C. Walker, Attorney for Administrator.

"From the Minutes, June Term, 1850. The annual report of Niles F. Smith, administrator of this estate, is hereby received, approved and ordered to be recorded, and further ordered that the business of the estate be continued. Continued.

"From the Minutes, July Term, 1850. Petition for Sale, Filed August 6, 1850. State of Texas, County of Harris: To the Hon. Chief Justice in and for said County: The petition of Niles F. Smith, administrator of Joseph Rutch, deceased, represents that said estate has been long since opened and that no debts against said estate have been presented to your petitioner for allowance and payment; that there are no heirs of said estate within the knowledge of your petitioner; that your petitioner incurred the expense of twenty-nine and ninety-five one-hundredth dollars in procuring the land certificates belonging to said estate, and other expenses, as will appear by reference to petitioner's bill, dated July 25, 1850. That your petitioner has paid the sum of nine and twenty-five one-hundredth dollars costs of court in said estate, up to the appointment of F. Gray, curator; that there is a balance due of nine and twenty-five one-hundredth dollars, costs of court, besides what has been incurred lately, the amount of which is unknown to your petitioner. All of which appears upon the records of said court, which are prayed to be inspected. Wherefore, your petitioner prays the court to grant an order to sell the land certificates included in the inventory to pay said expenses, as also the expenses of closing the administration. And as in duty bound will ever pray. Niles F. Smith, Administrator. Sworn to and subscribed before me, this 26th day of July, 1850. Otis McCaffey, J. P.

"From the Minutes, August Term, 1850. The petition of Niles F. Smith, administrator of this estate, for a sale coming up for consideration, and the same having been examined, it is ordered, adjudged and decreed by the court that the administrator of this estate proceed to sell at public auction to the highest bidder for cash, at the courthouse door of Harris County, on the first Tuesday of October next, after giving twenty days notice thereof, the following property, to wit: One-third of a league of land, the headright certificate of the deceased, and a bounty land certificate for 320 acres also granted to the deceased. It is further ordered that he report said sale to the October term of said court. It is further ordered that the business of the estate be continued.



"Petition for Sale, Filed October 2, 1850. State of Texas, County of Harris. To the Chief Justice in and for said County: The petition of Niles F. Smith, administrator of Joseph Rutch, deceased, represents that by accident your petitioner failed to make sale of the certificate belonging to said estate on the last sale day. Wherefore, he prays a continuance of the order of sale heretofore entered in said estate, and your petitioner have further time to make the sale. As in duty bound, etc. Jas. C. Walker.

"From the Minutes September Term (Oct. 2), 1850. The administrator of this estate having verbally reported that he had neglected to sell the property of this estate, for which he had an order to sell on the first Tuesday in October, and petitioned for a renewal of the same. It is therefore ordered that the said administrator pay the costs of said order of sale heretofore made, and upon his petition for sale it is ordered that the order entered at the August term for a sale be renewed so as to take place on the first Tuesday of November, A. D. 1850, and further ordered that he make a return of said sale to the November term of said court, and further ordered that the case be continued. Continued.

"From the Minutes, October term, 1850. Account Sales, Filed November 6, 1850. Estate of Joseph Rutch, deceased. The undersigned administrator of the estate of Joseph Rutch, deceased, reports that in pursuance of an order of sale to him directed in the matter of said estate he proceeded on the first Tuesday in November, A. D. 1850, after having given twenty days previous notice of the same, to sell at the courthouse door of Harris County within the hours prescribed by law to the highest bidder for cash, and William R. Baker offered the sum of forty dollars for a certificate for one-third of a league of land granted to the heirs of Joseph Rutch, deceased, by the board of land commissioners of Harrisburg County, No. 396, dated February 3, 1838, and fifteen dollars for a certificate for 320 acres bounty granted to Joseph Rutch by the Secretary of War and dated December 29, 1837, No. 1434, and they being the highest and best bids, said lands certificates were sold to said W. R. Baker. He further asks that the said sale may be confirmed. Niles F. Smith, Administrator, by Jas. C. Walker, Agent and Attorney in Fact. Sworn to and subscribed before me Nov. 6, 1850. W. R. Baker, Clerk.

"From the Minutes, November Term, 1850. The account sales of the administrator having been filed and the said sale having been conducted according to law and the order of the court, it is ordered by the court that the said sale be approved and confirmed and the return thereof recorded. It is also ordered that Niles F. Smith, administrator, execute to Wm. R. Baker a conveyance for the certificate of headright of Joseph Rutch, deceased, granted by the board of land commissioners of Harrisburg County, No. 396, dated February 3, 1838, for one-third of a league of land; also a bounty land certificate granted to Joseph



Rutch for 320 acres No. 1434, dated December 29, 1837, and further ordered that the business of this estate be continued. Continued.

"From the Minutes, December Term, 1850. Exhibit and Petition for Discharge, filed February 1, 1851. State of Texas, County of Harris. To the Hon. County Court in and for said County: Niles F. Smith, administrator of Joseph Rutch, deceased, respectfully presents this his account of his acts and doings in said estate up to this time.

"Niles F. Smith, administrator, etc., debtor to the estate of Joseph Rutch, deceased:

"To amt. of sale of certificate for one-third league....	\$40 00
"To amt. of sale of certificate for 320 acres.....	15 00

"Amount dr.....	\$55 00
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"Credit. By amount attorney's fees.....	\$25 00
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"Credit. Amount expenses procuring certificate.....	
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"Credit. Amount costs of court.....	42 00
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"\$67 00	\$67 00
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"12 00

"Your petitioner prays that the above may be approved and ordered to be recorded by your honor. We would further represent that no other property belonging to said estate has come to his knowledge and that there remains nothing of said estate to be administered. Wherefore he prays his receipts herewith filed may be recorded and he discharged from further management and liability on account of said estate. Niles F. Smith, Administrator of Joseph Rutch, Dec'd., by Jas. C. Walker, Attorney for Administrator.

"From the Minutes, January Term (Feb. 3), 1851. The final account and resignation of Niles F. Smith, administrator of this estate, having been examined, it is ordered that said account final be approved. It is also ordered that the resignation of the said Smith as administrator be accepted and he, together with the sureties to his bond, discharged from further liability. Estate Closed.

"The State of Texas, Harris County. I, E. F. Dupree, clerk of County Court in and for the County of Harris in the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of all the proceedings had in the County Court of Harris County and entered in the probate records thereof in the matter of the estate of Joseph Rutch, deceased, as the same appears of record in my office in vol. A, pages 304-305, vol. C, pages 221-222, and 475-476 of the probate records of said Harris County.

"Witness E. F. Dupree, clerk of said court, and the seal thereof at office in Houston, on this the 29th day of May, 1897. [Seal] E. F.



Dupree, Clerk County Court Harris County, Texas, by E. Y. Speed, Deputy."

It is contended on behalf of appellants that the administrator's sale disclosed by the documents referred to was null and void and did not pass the title from the estate of Joseph Rutch. Two main objections are, (1) that at the time the sale was ordered and made, the succession was closed, and the court had no jurisdiction to order or approve the sale; and (2) that if jurisdiction existed to make the sale, the description of the property sold was insufficient to pass the title.

We rule against appellants on both the points referred to. Looking to all the documents bearing on the subject, we think the property was sufficiently described. It does not appear from any order made by the probate court that the administration upon the estate had been closed at the time the sale was made. It may be true that ten years elapsed during which no order was made by the probate court, but such fact can not avail in a collateral proceedings to defeat a probate sale. It was so held in *Burdett v. Silsbee*, 15 Texas, 617. See also *Templeton v. Ferguson*, 89 Texas, 47, 33 S. W. Rep., 329; *Crawford v. McDonald*, 88 Texas, 626, 33 S. W. Rep., 325, and *Shirley v. Warfield*, 12 Texas Civ. App., 449, 34 S. W. Rep., 390. Besides, we are disposed to concur in the suggestion made in argument, that it was not affirmatively shown that ten years, or any other specified time, elapsed between orders. No witness testified that the probate records put in evidence included all the orders made by the probate court, and the certificate of the clerk does not seem to go to that extent. It states that the documents that were put in evidence were correct copies of all the proceedings had in the estate referred to in the County Court of Harris County, and entered in the probate records on certain pages of two volumes of such records. To say the least, it does not clearly appear from this certificate that other orders were not made in the Joseph Rutch estate, and recorded in other volumes of the probate record.

No error has been pointed out and the judgment is affirmed.

*Affirmed.*

Writ of error was refused by the Supreme Court April 28, 1904.



## JOHN Q. A. SIMMONDS v. NICHOLAS T. P. SIMMONDS.

Decided March 9, 1904.

**1.—Evidence—Transfer of Certificate—Ancient Instrument.**

A transfer of a land certificate coming from the proper custody, dated more than forty years ago, and under which title has been claimed, with no circumstances casting suspicion on its genuineness, is admissible without proof of its execution or that it had actually existed for twenty years, though its genuineness had been attacked by affidavit.

**2.—Same—Identifying Certificate.**

A transfer of a land certificate "No. — issued in said county of W., for one-third of a league of land, to me, the said W. C., as a headright," sufficiently identifies the duplicate one-third league headright certificate of the person transferring it, and evidence that an augmentation certificate for two-thirds of a league and labor was subsequently issued to the same party, had no tendency to disprove such identity.

**3.—Power of Attorney—Presumption—Ancient Instrument.**

A power of attorney is conclusively presumed in support of a conveyance by attorney, more than thirty years old, coming from the proper custody, and found to be genuine.

**4.—Evidence—Land Office Copy—Affidavit.**

A certified copy, from the records of the Land Office, of an affidavit by a third party that he was the owner of the headright certificate on which patent to the land in controversy was issued, is not admissible in disparagement of the title of another claiming the land by transfer from the grantee of the certificate.

**5.—Evidence—Character for Truth.**

A party can not introduce evidence of his own character for truth, which has not been impeached otherwise than by the introduction of evidence conflicting with his own.

Appeal from the District Court of Bell. Tried below before Hon. John M. Furman.

*F. C. Humphries* and *A. J. Harris*, for appellant.

*W. S. Banks*, for appellee.

**STREETMAN, ASSOCIATE JUSTICE.**—Appellee brought this suit to recover of appellant 117½ acres of land, a part of the Willard Chamberlain headright one-third league in Bell County. Defendant pleaded not guilty and the ten years statute of limitations. A jury trial resulted in a verdict and judgment in favor of appellee for the land sued for and rents.

The plaintiff relied for title upon the following evidence: (1) Duplicate certificate No 1159-1258, issued by the Board of Land Commissioners of Washington County to Willard Chamberlain for one-third of a league of land, in lieu of headright certificate No. 512, class first; (2) certified copy of patent No. 551, vol. 9, from the State of Texas to Willard Chamberlain, dated April 23, 1852, by virtue of duplicate certificate above mentioned, describing one-third of a league in Bell County, Texas, including the land in controversy; (3) original transfer from Willard Chamberlain, by Louis C. Clemons, as agent, to Jos. P. Sneed, which transfer is as follows:



"The State of Texas, County of Washington. Know all men by these presents that I, Willard Chamberlain, by my attorney in fact Louis C. Clemons, for and in consideration of the sum of one hundred and fifty dollars, to me paid, have bargained and sold and do by these presents bargain sell and convey and confirm unto Joseph P. Sneed all and singular the following certificate No. — issued in said county of Washington for one-third of a league of land to me, the said Willard Chamberlain, as a headright.

"To have and to hold the said certificate and the land upon which the same may be located unto him the said Sneed his heirs and assigns forever. And I do hereby authorize the said Sneed, his heirs and assigns, to demand and receive patent thereto in his or their own names. In witness whereof, I hereunto set my hand and seal, a scroll used as such, this — day of —, A. D. 1850.

"LOUIS C. CLEMONS,

"As agent for the said Chamberlain.

"In presence of Thos. R. Nunn, Moses Candy."

Said transfer being acknowledged regularly by said Clemons as said agent before J. J. Stockbridge, clerk District Court Washington County, Texas, on the 11th day of December, 1873, with certificate of said officer indorsed thereon bearing same date in regular form, and said transfer having been recorded in said Washington County on said 11th day of December, 1873, also in Bell County on 18th day of August, 1890, and again in Bell County on February 24, 1903.

In connection with said certificate, plaintiff introduced certain parol testimony of W. S. Banks, which we deem it unnecessary to set out at length, but which in our opinion, especially in view of the testimony subsequently developed from the defendant himself, was sufficient to show that said transfer came from the proper custody. (4) Deed from Joseph P. Sneed to N. T. P. Simmonds, dated February 1, 1860, recorded in Bell County, February 10, 1860, conveying the land in controversy. There was also evidence sufficient to sustain the amount of rent as found by the jury.

The defendant introduced no paper title, but relied upon the failure of the plaintiff to prove title, and upon his evidence of limitation.

*Opinion.*—The first assignment of error complains of the introduction in evidence of the transfer of certificate from Clemons to Sneed, (a) because there was no authority shown in Clemons for the execution of said instrument as agent for Chamberlain; (b) because said instrument was not proved to be over thirty years old, or an ancient instrument, its genuineness having been attacked by the affidavit of forgery filed by defendant; (c) because there was no evidence of the execution of said instrument by Clemons, even if he had been Chamberlain's agent; (d) because the testimony failed to show that said instrument came from



the proper custody, even if it was an ancient instrument; (e) because the transfer itself does not identify any land certificate, even by date or number; (f) because said instrument was not signed in the name of Willard Chamberlain, but only in the name of Louis C. Clemons.

We think there was no error in permitting the introduction of the transfer. As we have already stated, the evidence was sufficient to show that it came from the proper custody. There was also evidence to show that the land in question had been claimed under this transfer for many years. In fact, the evidence shows that the defendant himself obtained this certificate from a son of J. P. Sneed, and caused it to be recorded in Bell County, Texas; and strongly indicates, if it does not conclusively show, that the defendant went into possession of this tract of land under the deed from Sneed, based upon this transfer. There are no circumstances connected with the certificate or shown upon its face which are calculated to cast any suspicion upon it. The court submitted its genuineness to the jury as an issue of fact, and their finding was in favor of its validity.

We are also of opinion that it sufficiently identifies the certificate as the same by virtue of which the duplicate was afterwards issued under which the land in question was patented.

It being established by the evidence and by the finding of the jury that the instrument was genuine, that it was more than thirty years of age and came from the proper custody, it was properly admitted in evidence and carried with it as a conclusive legal presumption the authority of Clemons to act as agent for Chamberlain. *O'Donnell v. Johns & Co.*, 76 Texas, 362; *Harrison v. McMurray*, 71 Texas, 122; *Davis v. Pierson*, 26 S. W. Rep., 241; *Garner v. Lasker*, 71 Texas, 435.

The second assignment of error complains of the admission of the duplicate certificate and patent above set out, because the transfer from Clemons, as agent of Chamberlain, to Sneed does not identify said certificate, and said patent is not shown to have been issued by virtue of the certificate conveyed by said transfer. As we have already stated, we are of opinion that the transfer sufficiently identified the certificate.

The fourth assignment of error complains of the refusal of the court to admit in evidence a certified copy from the Land Office of an affidavit made by W. R. Baker on August 10, 1863, stating that said Baker was the owner of the Willard Chamberlain one-third league headright certificate, issued by the Board of Land Commissioners of Washington County.

This evidence, we think, was clearly inadmissible for any purpose. Said assignment also complains of the exclusion of a certified copy of a certificate for two-thirds of a league and labor of land, issued by the Board of Land Commissioners of Washington County to Willard Chamberlain, December 31, 1859, as an augmentation to the headright of one-third of a league. This was offered for the purpose of showing that other certificates were issued to Willard Chamberlain, and might



have been the subject of the transfer from Clemons to Sneed, instead of the certificate under which the land in question was patented.

We do not think, however, that the evidence offered could have had this effect. Clearly, there was only one certificate issued to Willard Chamberlain for one-third of a league as his headright, and the transfer, as we have already stated, containing this description, we think was sufficient to identify this certificate, and the evidence offered would not have tended to disprove the identity of the certificate described.

The fifteenth assignment of error is based upon the refusal of the court to permit a number of witnesses to testify to the reputation of the defendant for truth and veracity, honesty and integrity in the community in which he lived, because there was a conflict between the evidence of plaintiff and defendant. A mere conflict in evidence does not authorize a party who has testified as a witness to put his character in issue.

The remaining assignments complain of the charge given by the court, and of the sufficiency of the evidence. The court submitted to the jury the genuineness of the transfer above set out, and the issues arising out of the plea of limitations, and we believe that no other issues were necessary to be submitted to the jury, and that the instructions of the court upon these issues were as favorable as appellant was entitled to. The evidence, in our opinion, abundantly sustains the verdict of the jury.

There being no error in the record, the judgment is affirmed.

*Affirmed.*



SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY v.  
MRS. BUNNY BROCK ET AL.

Decided March 9, 1904.

**1.—Railway—Master and Servant—Death—Negligence.**

Facts considered and held to support a recovery for damages resulting from death of a watchman on railway bridge run down by train, by reason of negligence in running it at speed prohibited by the rules and without customary signals and in failing to use due care to discover his perilous position or to avoid striking him after discovering it.

**2.—Discovered Peril—Charge.**

A charge that if railway employes operating a train saw a person on the track in time to avoid striking him it became their duty to exercise ordinary care to avoid collision, held not to be upon the weight of evidence when considered in connection with other charges.

**3.—Charge—Evidence—Discovered Peril.**

Evidence considered and held sufficient to justify the submission of the issue of negligence in the duties arising from the discovery of the perilous position of a watchman on a railroad bridge by the engineer of a train, though the engineer denied having discovered it in time,—there being circumstances tending to show the contrary.

**4.—Persons on Track—Lookout.**

At points where persons may be expected to be rightfully found on the track, those operating railway trains must exercise ordinary care in keeping a lookout for them.

**5.—Contributory Negligence.**

Evidence considered, in case of a watchman on railway bridge run down by train, and held to show circumstances under which the question of his contributory negligence was one of fact for the jury, involving the effect of omission of usual signals, and his right to rely on them and to expect the train to be run within the speed limit required by the rules.

**6.—Negligence—Master and Servant—Assumed Risk.**

Where a judgment for death of a servant is sustained on the ground that the injury was caused by negligence of another employe (not his fellow servant) and without contributory negligence of deceased, no question of assumed risk is involved; risks arising from such negligence are not assumed by the servant.

ON MOTION FOR REHEARING.

**7.—Death—Damages—Charge.**

A charge that the damages, recoverable for the death of a relative should be the "pecuniary loss, if any, sustained by the plaintiffs by reason of the death," was not erroneous in the absence of request for a charge limiting recovery to the present value of the future benefits reasonably to be expected had he not been killed.

Appeal from the District Court of Milam. Tried below before Hon. J. C. Scott.

*Duncan, Walters & Lane*, for appellant.

*T. S. Henderson and Freeman & Morrison*, for appellee.

FISHER, CHIEF JUSTICE.—This is a suit by Mrs. Bunny Brock in her own behalf, and as next friend for her children, W. F., Mildred and J. E. Brock, to recover damages in the sum of \$30,000, for the death of her husband, John Brock, which occurred on the 8th day of April,



1903, by an engine of one of appellant's passenger trains striking and throwing said Brock from the Little River bridge, thereby causing his death.

Appellant pleaded assumed risk and contributory negligence, and denied the negligence alleged by the plaintiff.

The appellant is charged with negligence in running its train at an unusual and too rapid rate of speed across the bridge, and that Brock was seen in time to have prevented striking him, or that he could have been seen by the use of ordinary diligence upon the part of the engineer, by keeping a reasonable lookout to discover his presence, and that the train approached the bridge without giving the usual and customary signals or ringing the bell or blowing the whistle.

Verdict and judgment were in favor of appellees for the sum of \$8000, which was apportioned among them. The verdict and judgment are sustained by the following facts:

John Brock, the deceased, was the husband of Mrs. Bunny Brock, and her coplaintiffs are the minor children of the marriage. At the time the deceased was killed and before, he was a bridge watchman in the service of appellant, it being his duty to guard the Little River bridge from fire. There were some other duties concerning the bridge which he was chargeable with, which are immaterial, and need not be noticed in disposing of this case. His duties required him to pass over the bridge after the passage of each train, and he was especially required to be at the south end of the bridge with his lantern lit, displaying a white light, so that the engineer of the north-bound passenger train could see the same, which train was due to arrive at the south end of the bridge about half past 2 o'clock in the morning. He had special directions from the officials of the railway company who were charged with the duty of directing his movements, to be at the south end of the bridge at that time. The train going north was usually on time. The passenger train going south was due to arrive at Cameron, a few miles north of the bridge, about 1:37 in the morning; but this train was usually and generally from thirty minutes to a few hours late, and upon the night that Brock was killed this train was thirty minutes behind time.

Brock and his family lived in a house furnished by the railway company at the north end of the bridge, about a hundred yards from where it commenced. The house was within a few feet of the track. On the night that he was killed it was his duty to go to the south end of the bridge in order to be there with his light displayed when the north-bound passenger train should arrive; and, in pursuance of this duty, he left his house on a velocipede, which was furnished to him by the railway company, for the purpose of passing over the bridge, a few minutes after 2 a. m. When the southbound train was not on time, it was usual and customary for him to leave his house a little after 2 o'clock, for the purpose of going to the south end of the bridge, in order to comply with his instructions to meet the north-bound passenger train.



The night that he was killed, when he started over the bridge south on the velocipede, he placed his lantern with a white light at the rear end. The light was then burning, and the evidence tends to show that it could have been seen by the engineer and fireman operating the train from the north.

The watchman's house where Brock resided is about 100 yards from the end of the bridge, and north of the house a train can be seen about 350 feet. Brock was struck and killed by the south-bound passenger train about 2:18 o'clock in the morning, when he was on the bridge on his velocipede, going to the south end thereof, in order to meet the north-bound passenger train. The bridge was about a mile and a quarter long, and Brock was killed about 1500 yards from its north end. From about his residence at the north end of the bridge to the point where he was struck, the track is straight; and it does not appear from the evidence that there was anything to obstruct the view of the engineer. The headlight on the locomotive that struck him was burning and appears to have been in good condition. Also it appears that the brakes and appliances for stopping the train were in proper condition.

The facts authorize the conclusion that the engineer operating the locomotive pulling the train going south that struck Brock, knew that Brock's duties required him to be at the south end of the bridge when the north-bound train should pass; and the inference to be drawn from the evidence is that he knew that Brock lived at the north end of the bridge, and that he was charged with the duty of crossing the bridge for the purpose of inspecting it, in order to guard against fire. It was usual and customary for the train approaching from the north to sound the whistle in approaching the bridge and to ring the bell when passing Brock's residence; and there were instructions to the effect that such train should slow down to a speed of from twenty-five to thirty miles an hour in crossing the bridge. There is evidence to the effect that on the night in question, on the approach of the train coming from the north at the bridge, the whistle was not sounded nor was the bell rung when the train was passing the house of the watchman.

There is also evidence to the effect that the train, in approaching the bridge and passing over the same, was running at a high rate of speed, between forty and fifty miles an hour, which was in excess of the usual schedule rate. And there is evidence showing that the whistle was not blown after the train went upon the bridge. The train at the time that it passed over the bridge was about thirty minutes late. The passenger train coming north was on time. The south-bound train that killed Brock did not stop when the collision occurred, but passed on and met the north-bound train at Minerva, a few miles south of the bridge.

There is evidence which tends to show that the engineer operating the south-bound train could, if a proper lookout had been observed, have seen the deceased Brock on the bridge in time to have stopped his engine; and in view of some evidence and circumstances in the record, the



conclusion is warranted that he did see Brock in time to have prevented running him down, although this fact is denied by the engineer. And it also appears that if the whistle had been sounded and the bell rung,—the usual warning of the approach of the train to the bridge,—and the train had been running at its usual rate of speed in passing over the bridge, that Brock could have escaped the collision, as it appears from the evidence that there were places along the bridge where he could have placed himself, and thereby have avoided being struck by the train. When he went upon the bridge in discharge of his duty to go to its south end to meet the north-bound passenger train, it does not appear that he was aware of the approach of the south-bound train. It was his custom and habit to leave his residence at the north end of the bridge, to go to the south end, a few minutes past 2 o'clock.

Therefore, from the facts as stated, we reach the conclusion that the acts of negligence, as above stated, are sustained by the evidence, and that some or all of these were the proximate cause of Brock's death. And the evidence also authorizes the conclusion that he was not guilty of contributory negligence, as charged in the defendant's answer. Nor was his death the result of one of the risks assumed by him, but was directly attributable to the negligence, as indicated by the facts stated.

Appellants first, second, third, fourth, fifth, sixth and seventh assignments of error are disposed of by our findings of fact.

The fifteenth assignment of error is too general to be considered.

The charge complained of in the eighth assignment of error was proper. The jury could not have misunderstood the charge, and it did substantially state the questions for their consideration.

The ninth assignment of error complains of the charge of the court which submitted to the jury the issue of discovered peril. This charge is to the effect that if the employes in charge of the train saw Brock in time to avoid striking him, it became their duty to exercise ordinary care under the circumstances to use means to avoid the collision. This branch of the charge, when considered in connection with the other charges given by the court, is not upon the weight of evidence, as is contended by appellant. The principal ground urged against it is that there was no evidence showing that the employes saw Brock in time to avoid striking him. The engineer testified that he did not discover the presence of Brock upon the bridge until he had gotten in about 100 feet of him, and then says that he sounded the whistle and used the appliances to stop the train.

There is no direct evidence contradicting the engineer upon this subject, but there are some facts and circumstances which have a tendency to show that he did see Brock in time to have stopped his train, if it had been running at the rate testified to by the engineer, which he testifies was about twenty-five or thirty miles an hour. From the time that he reached Brock's residence beyond the north end of the bridge the track was straight to the point where Brock was struck, and there was



nothing to obstruct the view of the engineer. The facts indicate that he knew that the bridge was guarded by a watchman, and that it was his duty to be at the south end of the bridge when the north-bound train passed. He knew the fact that he was behind time, and that the north-bound train had the right of way, as shown by his testimony, and it would be expected to reach the south end of the bridge a short while after his train should pass over it. There is a part of his testimony which tends to show that on the night in question, in passing over the bridge, he was performing his duty as an engineer in the regular and ordinary way, and if such was the case, knowing the possibility or the probability that the watchman might be on the bridge, it is reasonable to suppose that the engineer kept a lookout. The lantern carried by Brock, which was placed at the rear and north end of the velocipede as he left home going on the bridge, was burning when he went on the bridge, and when he was last seen upon it by his wife, according to the testimony of the plaintiff Mrs. Brock. If this light was burning at the time that the engineer got in sight of the bridge with a straight track ahead of him for a mile and a quarter, there was nothing to prevent him from seeing the light in approaching the bridge, and thereby have stopped his train before reaching Brock.

The evidence upon this subject warranted the jury in believing that the light was burning when Brock was passing over the bridge on the velocipede. With this view of the facts, the jury were not bound to accept as true the statement of the engineer to the effect that he did not see Brock before he got within 100 feet of him. *Brown v. Griffin*, 71 Texas, 659.

The tenth assignment of error complains of the charge of the court wherein was submitted to the jury the act of negligence in running the train at an unusual and high rate of speed, and of the failure of those operating the same to exercise ordinary care in keeping a lookout to discover if Brock was on the bridge, and in failing to give the signals in approaching the bridge.

Our findings of fact dispose of these questions as raised in this assignment. There is evidence to the effect that in crossing the bridge the engineer was causing the train to be run at an unusual rate of speed, and that in approaching the bridge, and after getting upon it, he failed to give the usual and customary signals of warning of his approach. And there is a theory of the case raised by the evidence that would authorize the jury to conclude that if he did not actually see the deceased in time to prevent running him down, he could have discovered his presence on the bridge by the exercise of ordinary care in keeping a lookout. There is no escape from the conclusion that the engineer knew that the bridge in question was frequently passed over by the watchman, and that this was required to be done by the watchman in the performance of his duties.

The rule is well settled that at places where it is expected that persons will be rightfully found upon the track, ordinary care under the cir-



cumstances must be exercised to keep a lookout for them. *St. Louis S. W. Ry. Co. v. Arnold*, 32 Texas Civ. App., —, 74 S. W. Rep., 821, and *St. Louis S. W. Ry. Co. v. Jacobson*, 28 Texas Civ. App., 150, 66 S. W. Rep., 1113.

What we have said practically disposes of the eleventh assignment of error. This assignment, together with an objection to the charge considered under the tenth assignment of error, also raises the question that the court erred in submitting to the jury as an issue the contributory negligence of the deceased Brock. The appellant's contention is that the evidence clearly shows that Brock was guilty of contributory negligence. We can not accept this view of the evidence. Brock's duties required him at the time he went upon the bridge, to go to its south end, in order to meet the north-bound passenger train. He started at his usual and customary time. There was no warning given of the approach of the train, and it appears that he had passed over about 1500 yards of the bridge before he was struck.

In considering the question whether he was in the exercise of ordinary care in going upon the bridge at the time he did, the jury had the right to consider in passing upon the issue of contributory negligence, the question whether Brock was, under the circumstances, justified in relying upon the fact that the engineer operating the south-bound train would give the usual and customary signals in approaching the bridge, and would run at the usual and customary speed, and would keep a proper lookout for his safety. If at the time that Brock went upon the bridge there was nothing to indicate the danger of doing so by the approach of a train from the north, it was not unreasonable for him to rely upon the fact that the usual signals and warning would be given to indicate the approach of the train, and that it would be run at the reasonable schedule rate, so as to be under the control of the engineer, whom he had the right to suppose would keep a reasonable lookout for him.

When signals and warnings are usually given, or a limited speed is required at certain places, one going rightfully upon the track may, in some instances, assume that these duties will be observed; and we are of the opinion that this is a case in which this rule should be applied. *International & G. N. R. R. Co. v. Ives*, 8 Texas Ct. Rep., 722; *Texas & P. Ry. Co. v. Fuller*, 13 Texas Civ. App., 152, 36 S. W. Rep., 319; *Carriway v. Houston & T. C. Ry. Co.*, 6 Texas Ct. Rep., 524; *Missouri K. & T. Ry. Co. v. Cardena*, 22 Texas Civ. App., 301.

Whatever question of assumed risk there is in the case was covered by the charge of the court. But, however, in disposing of this question it is only necessary to say that if the judgment can be maintained upon the ground of negligence, as stated, there is no question of assumed risk in the case, for if Brock was injured in the performance of his duty, under circumstances showing that he was not guilty of contributory negligence, by reason of the acts of negligence charged to the appellants



as shown by the evidence, the railway company would be liable. Such risks as arose from the character of negligence charged were not assumed by Brock.

We have considered the questions raised in the twelfth, thirteenth and fourteenth assignments of error, and in our opinion they present no reversible error.

We find no error in the record and the judgment is affirmed.

*Affirmed.*

#### OPINION ON REHEARING.

FISHER, CHIEF JUSTICE.—The trial court gave the following charge on the measure of damages: "If you find for the plaintiffs, it will be your duty to ascertain from the evidence what pecuniary loss, if any, has been sustained by the plaintiffs by reason of the death of said Brock, and you will make that sum the amount of your finding. The plaintiffs are not permitted to recover anything on account of grief, nor on account of the loss of the society of the said Brock; but their right to recover, if any, then must be limited to the pecuniary loss sustained."

Appellant complains that this charge does not present the correct measure of damages, in that it fails to instruct the jury that the appellees can only recover such sum as would be a present compensation then paid for all of the future contributions and benefits they had a reasonable expectation of receiving from Brock, had he lived. No additional charge was requested by appellant upon this subject. The charge as given limits the liability of the appellant to the pecuniary loss sustained by the appellees by reason of the death of Brock, and this we understand to be the extent of recovery allowed by law. They were certainly entitled to recover for the pecuniary loss sustained by reason of the death of the husband and father; and we are of the opinion that while the rule contended for by the appellant is correct, a request should have been made that it be submitted to the jury. The facts do not suggest that in determining what was the pecuniary loss sustained by the plaintiffs; the jury awarded more than what would be a sum then paid as a present compensation for the future contributions and benefits they had a reasonable expectation of receiving from the deceased Brock, had he lived. And in this connection it is well to say that there is no assignment complaining that the verdict of the jury exceeded the amount that the plaintiffs would be justly entitled to as compensation.

Motion for rehearing is overruled.

*Overruled.*

Writ of error was refused by the Supreme Court, May 5, 1904.



INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY v.  
HARRY B. REEVES.

Decided March 9, 1904.

**1.—Assigning Part of Cause of Action—Attorney—Liability for Costs.**

An attorney for a plaintiff, having become the owner of a part of the cause of action by transfer before suit is brought, is not thereby liable, as a party to the suit, for security for costs.

**2.—Permanent Injuries—Mortality Tables—Evidence.**

Evidence held to show permanent injuries to a railway switchman warranting introduction of mortality tables as evidence.

**3.—Argument of Counsel—Improper Remarks—Withdrawal.**

Improper remarks by counsel to the jury, where withdrawn, held not ground for reversal.

**4.—Pleading—Raising Issue.**

Pleading and evidence held to properly raise the issue of negligence on the part of defendant in failing to keep appliances in repair.

**5.—Charge—Negligence—Issue Raised.**

A charge upon negligence which ignores the defense of assumed risk is not erroneous where it is not shown that there was any testimony raising this issue.

**6.—Pleading—Defective Car—Failure to Inspect.**

A petition alleging negligence of defendant in respect to furnishing a safe car embraced a negligent inspection or failure to inspect such car.

**7.—Verdict—Railway Switchman.**

Evidence considered and held to support a verdict of \$7500 as not excessive, in the case of a railway switchman being thrown from the top of a moving box car by reason of a defective brake.

Appeal from the District Court of Wood. Tried below before Hon. R. W. Simpson.

*N. A. Stedman and Gould & Morris*, for appellant.

*H. D. Wood and Giddie & Harris*, for appellee.

JAMES, CHIEF JUSTICE.—Plaintiff Reeves, a switchman in appellant's employ, alleged his injury to have been occasioned by the latter's negligence in various forms, he being thrown from the top of a moving box car to the bottom of a coal car next to it, in the yards at Mineola, in the nighttime, while in the performance of his duties.

The verdict involves the findings of fact that plaintiff's injuries were due to defendant's negligence, that he was not guilty of contributory negligence, that his injury did not occur through the risks ordinarily incident to his employment, and such are necessarily our conclusions on this appeal.

The first assignment of error will be overruled. Although plaintiff's attorney may have become the owner of part of the cause of action, by transfer before the suit was brought, for his legal services, this did not entitle the court to treat him as a party for the purpose of giving security for costs. *Galveston H. & S. A. Ry. Co. v. Mathes*, 7 Texas Ct.



Rep., 172. A motion of this sort will prevail only against one who is in fact a party. It has been even held that errors in respect to such motion against a party become immaterial when the plaintiff recovers. *Yoakum v. Mettasch*, 26 S. W. Rep., 129. The motion was entitled to no respect as a pleading complaining of the nonjoinder of the attorney as a party, as it was not sworn to. It was simply a motion for one not a party to be required to give security for costs. Furthermore the transfer refers to the cause with Reeves as the plaintiff, and authorizes the attorney to do all things necessary in the prosecution or settlement of said cause, whether in or out of court. The transfer or contract properly construed authorized the attorney to prosecute the cause in plaintiff's name.

The second assignment complains of the use of mortality tables as evidence, there being, as appellant alleges, no evidence that plaintiff was permanently injured as regards his earning capacity.

Under plaintiff's testimony it was admissible for the jury to find that his earning capacity would be destroyed or impaired in the future, and for what time the result would probably extend. It was admissible, we think, for them to have found that the condition of impairment was permanent, and if this be so, the mortality tables were proper evidence.

All the testimony concurs that his leg, which was broken, is about an inch shorter than before and that he limps, but this does not appear to materially affect his capacity for work. Of his condition at the time of the trial, which was about eight months after the accident, after stating his intervening condition and sufferings, in which he was corroborated, he testified that his back hurts him yet; that he can not lie on his back over ten or fifteen minutes; that it hurts him to lie on his right side; that he can not have an action without taking medicine; that his sexual passion is completely destroyed; that he does not know whether he hurt his head or not; that it seems to him at times that he has not the right sort of sense; that he has to sleep with his leg straightened to be able to sleep at all; that he has pains in his back and sides and has to sleep on his left side mostly; that he was always healthy before the accident, and that he is now unable to perform any work.

The above indicates his injury to be of a serious nature involving his back or spine and nerves, which has continued for about eight months. This is some evidence that his injuries are permanent. It appears to be his settled condition. Upon such evidence it would not be error to submit to a jury whether or not this condition of a plaintiff was permanent. *Louisville Ry. Co. v. Casey*, 71 S. W. Rep., 876; *Texas & P. Ry. Co. v. Davidson*, 3 Texas Civ. App., 542.

If plaintiff's testimony was accepted with reference to his condition, which the jury had the right to do, this condition continued to exist at the time of the trial. It would naturally continue so for some period, and the jury were necessarily judges of what this period would be. The jury were authorized to find, in the wide discretion allowed then in



matters of this kind, owing to the impracticability of definite and certain proof on the subject, how long this condition would probably last. If they believed it would last indefinitely, what reason could be given for interfering with their judgment on this question of fact? Where would the court set the limit?

If physicians should all concur in testifying that the symptoms detailed by plaintiff showed a condition that was temporary or curable, we might in such a case feel authorized to hold that a finding that he was permanently disabled was against the weight of the evidence. But this is not the state of the medical testimony here. The physicians do not speak with any degree of certainty on the subject. Juries themselves have some knowledge of matters of common experience, such as injuries to the person, and to some extent are able to form opinions as to the results of such injuries as plaintiff described, and were not obliged to lay aside their own understanding and observation of such matters for the mere opinion or theories of physicians. In our opinion, because the jury in determining the length of time plaintiff's disability or impairment would probably continue, might have concluded that it would continue permanently, there was no error in admitting the tables.

Plaintiff's counsel in the closing argument stated that "the railroads had well nigh corrupted the virtue of the country." This ought not to reverse the judgment, inasmuch as the court stopped counsel and told him that the remark was improper and counsel stated to the jury that he withdrew the statement.

The fourth and fifth assignments relate to refused instructions which did not state the law. One of them would have told the jury unqualifiedly that if the defects complained of in the cars, tracks and premises were open and visible, plaintiff assumed the risk; the other, that if he could have known the presence of the coal car with which his car collided by reasonable diligence, to return a verdict for defendant.

The requested charge referred to by the sixth assignment was similarly erroneous, and should have been refused. But the court gave it with a qualification which was correct. The giving of the charge was an error favorable to defendant.

The seventh is not well taken. The point is that the pleadings and evidence raised no issue as to defendant's negligence in failing to repair the "racket and dog" on the car upon which plaintiff was engaged. There is no foundation for this allegation of error. The petition alleged that defendant negligently failed to furnish plaintiff a reasonably safe place to perform his duties in this (among other things), that the car on which plaintiff was riding was defective, unsafe, unsuitable and unfit for use in this: That the brake wheel and brake rod and the brake chain and racket or dog controlling the brake wheel were broken, defective and out of repair, so that the same failed to hold the brake when set or attempted to be set. Plaintiff testified: "I got up there to set the brake. It would set all right, but it would not hold. I tried it several times."



The eighth embodies this alleged error: The court in the seventh paragraph charged the jury to find for plaintiff if defendant was negligent in furnishing the racket and dog and plaintiff's injury was the direct and proximate result thereof, unless they found that plaintiff was guilty of contributory negligence. The objection is that this charge ignored the defense of assumed risk.

Appellant's brief does not state nor attempt to show that there was any testimony which raised an issue of assumed risk in reference to the "dog or racket" or the car upon which plaintiff was riding. This was necessary in order to make a showing of error.

The ninth alleges that there was no allegation nor evidence warranting the court in submitting the issue whether or not the car from which plaintiff fell was kicked at a dangerous rate of speed, and furthermore the charge (eighth and tenth paragraphs) assumed that a high and unnecessary rate of speed as was alleged in the petition, was a dangerous rate of speed. "A high and unnecessary rate of speed" is a sufficient allegation to warrant a finding of dangerous speed. The court did not assume that the speed was dangerous, but left it to the jury. The evidence conflicted as to the speed at which the car was kicked. Plaintiff testified that he could not tell how fast it was going as it was approaching him endwise, but he thought it was moving about its usual speed of about six miles an hour. Evidence that it was going ten or fifteen miles an hour was therefore evidence of unusual speed. Whether it was dangerous or not was for the jury. It was proper for the court to submit the issue of dangerous speed, as it was only in that respect that the speed of the car was material.

The question raised in respect to the tenth clause of the charge is, not that the charge was any manner incorrect in law, but that it was on an issue not in the case. The issue was involved in and affected the issue of contributory negligence. When contributory negligence is pleaded, plaintiff is entitled to have any matter affecting such question submitted. The statement in the brief is confined to showing that no issue involving that matter had been pleaded. Therefore the tenth assignment is overruled.

In reference to the eleventh assignment we find there was evidence in regard to inspection of the car from which plaintiff fell. Defendant's car inspector at Mineola testified that this was a foreign car, that they inspected foreign cars, and that he had not inspected this one prior to the accident because he had not received it. He testified they sometimes inspected sixty cars in a night. Defendant had this car in use at the time plaintiff was hurt. The charge was: "It is the duty of defendant to inspect its cars and all cars used by it, and a failure to use ordinary care to so inspect would be negligence, and you will look to all the facts and circumstances in evidence to determine whether defendant was guilty of negligence in failure to inspect said car before the injury." The petition charged negligence of defendant in respect to furnishing



a safe car, and this embraced a negligent inspection or a failure to inspect the car. Therefore the objections to the charge are not well taken, viz., that the petition does not charge that failure to inspect was negligence; that there was no evidence on the subject, and no evidence that plaintiff was injured as the proximate result of such negligence.

The verdict was not contrary to the law nor contrary to the evidence, and from plaintiff's account of his injuries and suffering, he being 21 years of age, in good health and earning about \$60 a month at the time of the injury, the verdict for \$7500 was not excessive.

*Affirmed.*

Writ of error refused.



## B. H. EPPERSON ET AL. V. PAUL REEVES ET AL.

Decided March 9, 1904.

**1.—Will—Construction—Independent Executors—Filing Report.**

The provision of a will empowering executors to act independently of orders or interference from the probate court was not invalidated by a further provision that the executors should file, from year to year, with the probate court a report showing the condition of the estate, especially where it is expressly stated that the purpose of the filing of this report is that it may be seen by creditors and heirs.

**2.—Revised Statutes—Constitution—Not in Conflict.**

Article 1996, Revised Statutes, allowing suits and executions against the estates of decedents, is not in conflict with article 5, section 16, of the State Constitution, conferring on county courts general jurisdiction over probate matters.

Appeal from the District Court of Red River. Tried below before Hon. Ben. H. Denton.

*Smith & Beaty*, for appellants.

*Lenox & Lenox and Chambers, Doak & Kennedy*, for appellee.

JAMES, CHIEF JUSTICE.—Appellant Jamie Epperson it appears is entitled to recover an interest in the tract of land in controversy situated in Red River County, unless deprived of that right by the sheriff's deed hereinafter mentioned. The will of her father, B. H. Epperson, appointed executors, J. P. Russell and his son R. P. Epperson, with the following powers:

"Item 3. I desire that the debts due by me shall be paid as early as practical, consistent with the interest of all parties concerned, and to this end I provide that my executors shall be authorized to sell any real or personal property upon time or for cash, as they may deem expedient, for the purpose of the payment of the said debts, and I hereby authorize them to do so, or such of them as may accept this trust and may be acting as such at the time, and declare their conveyance shall be as effectual as any made by myself could be in my lifetime.

"Item 4. I hereby appoint J. P. Russell and my son, R. P. Epperson, as my general executors, to have control and management of all my estate except the property in Brazoria County, consisting of what is known as the Darlington plantation, and another tract of land, 2200 acres, head-right of ——. Over all this, I appoint my son, E. S. Epperson, executor to manage and control the same according to a contract existing between him and myself. But he shall report from time to time the condition of said property to my general executors, and this arrangement shall continue for a period of five years from my death, when the said J. P. Russell, R. P. Epperson and E. S. Epperson shall all be general executors of my whole estate, and in case of the death of either one or the refusal to accept and act, then my wife is to be substituted in his place,



provided she then be unmarried, and in case of her marriage afterwards, then she is to cease to have any right to act as executrix, and the remaining or surviving ones shall be invested with full power as are all. The object of appointing E. S. Epperson special executor to manage the property in Brazoria County is that he may make the said property pay the said debts incurred for it, and thus become entitled to one-fourth of it as provided in the contract with him, and that he may carry on the said plantation he shall be fully authorized to pledge the crops or any personal property in his possession for the necessary money to carry on the same, and he is for this purpose invested with the same authority that I would have in my lifetime to do, or anything else necessary to raise money, but if he should choose to abandon the said contract, he is authorized to do so and then become one of the executors, as it is provided for him to be at the end of the five years. It is my intention and desire that the proceeds arising from the said plantation in Brazoria County be appropriated to the payment of the debts incurred for its purchase and in its management, and to this end I have made the said E. S. Epperson executor and manager of the same, but in case of his refusal to act or death or resignation, then my said executors will take charge of the said property as if he had not been mentioned, and will manage the same as herein directed to the end that the same may be made to pay the debts incurred on its account if possible, but if this can not be done, then my said executors shall have the right to dispose of the same at discretion as they have all my other property.

"Item 5. I appoint my wife guardian of my minor children, of their person and property, so long as she remains unmarried, and declare that she shall not be requested to give bond, but to report from time to time to the court the condition of the estate of the said minors. But in case of her marriage, then she is to give bond as other guardians are required to do.

"Item 6. I hereby provide that my executors shall not be required to give any security, nor shall they be required to procure any orders from the county court or any other court for the management of my estate, but they shall manage the same without any interference of the court, except that they shall have this will probated and shall file an inventory of the property which comes to their hands as executors, and from year to year a report showing the condition of the estate, which may be seen by creditors and heirs. And as I have had to pay a very large sum of money for John N. Norris, as security, and have had to buy his property when it was sold by the trustee, I desire that my executors carry out the arrangement made with him, by which he is to redeem the said property by the payment of the said sums of money to my estate, and I advise the waiting with him a period of five years if necessary. I regard time as of importance in settling my estate, because it is impossible to realize upon property now, and I advise my



executors to get all the time they can to pay debts, and to settle the same with property, whenever possible."

The propositions of law upon which she relies to reverse the judgment against her are: (1) "The will of B. H. Epperson was not such as would withdraw his estate from the control and supervision of the probate court, because the testator did not say that no other action should be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and list of claims, the provision that the statute makes essential, but said merely that the executors should not be required to procure any orders from the county court for the management of his estate but should manage the same without any interference of the court, except that they should have the will probated and file an inventory of the property and from year to year a report showing the condition of the estate, which might be seen by creditors and heirs. Therefore the sheriff's sales were void. (2) "Article 1996, Revised Statutes, allowing suits and executions against the estates of decedents, violates article 5, section 16, of the State Constitution, and therefore these sheriff's sales were void."

The will was probated on October 2, 1878. The executors qualified and proceeded to act as such. E. S. Epperson died in November, 1881, and after that R. P. Epperson and J. P. Russell acted as sole executors. Numerous suits were brought, and judgments obtained against them as such executors in 1880 and 1881, which directed execution to issue against the property of the estate in the hands of said executors as provided by statute. Executions were duly issued accordingly and the land in question was regularly sold to David Rainey and John A. Bagley. For a deed under one judgment they paid \$17.26, under another \$22.20, under another \$250, and under another \$4.44. The land contained 444 acres and was then worth \$5 an acre, and is now worth \$35 an acre. The defendants hold regularly under said purchasers. The statement of facts recites that the judgments and sales were regular and sufficient to pass the title to said land unless the will was insufficient to withdraw the estate from the probate court and to authorize execution to run against the property, or unless the statutes authorizing such proceedings as were had be unconstitutional and void. No proceedings were had in the probate court establishing said claims or authorizing or approving the sales. Other tracts aggregating many thousands of acres were sold as this one was, and finally, long after these sales, said executors were removed and an administrator de bonis non was appointed, who on August 7, 1889, was finally discharged and the administration closed.

The above together with the portion of the will quoted are all the facts necessary to a decision of the questions presented on this appeal.

The recital in the statement of facts that said judgments and sales were regular and sufficient to pass the title of said estate unless for the



questions of law mentioned, requires us to assume that no question existed as to proper parties defendant in said suits at the time of the judgments.

The provision of the will empowering the executors to act in the management of his estate without the necessity of orders from the probate court, and without the interference of that court, was in our opinion sufficient authority for them to do what was necessary and proper in the settlement of his estate. The expression in a will, "management of my estate," ordinarily would mean to do that which necessity or advisability would dictate with a view to a settlement thereof. The terms of this will, however, leave no doubt as to the testator's intention to commit to his executors more than the mere managing or controlling of his property according to any restricted meaning of such terms. He expected them to settle his debts, to dispose of his property to settle same, and to that end, expressly authorized them to sell property, and even to pay debts with property, and his intention is clear that they were to act in all matters affecting the administration of his estate independently of any action of the court.

Appellant insists that all action of the probate court was not dispensed with in reference to the estate, and the estate not withdrawn in the meaning of the statute, because the will directed the executors to file a report from year to year showing the condition of the estate which may be seen by creditors and heirs. This in our opinion was not intended as any restriction on the exercise of the powers granted to the executors, not as intended to give the court supervision over the acts of the executors in the administration of the estate, and this being so the powers of the executors were as ample with this provision in the will as without it. Besides, the provision expressly states the purpose of its filing to be that it may be seen by creditors and heirs, and did not contemplate that it should be audited by the court and the acts of the executors embodied in it approved or disapproved. If such a construction were given this provision, it would entirely defeat the discretion which the testator conferred on his executors in plain terms. It is evident that this was his idea in reference to keeping the heirs and creditors informed periodically of what had been done by his executors, and that he did not intend thereby that the court should act upon such report and thereby supervise or revise their proceedings.

We conclude that the will comes within the provision of article 1995, Sayles' Revised Statutes, and that this was what is commonly known as an independent administration.

The second proposition can not be sustained. The question, being a constitutional one, and in its nature fundamental, it is strange, if it has any merit whatever, that our courts have uniformly acted upon the contrary view—not even discussing it—in passing on questions arising under this statute for so long a time. We feel under such circumstances that a discussion of the question is hardly justified. The constitutional



provision is that "the county court shall have the general jurisdiction of a probate court; they shall \* \* \* grant letters testamentary and of administration; settle accounts of executors; transact all business appertaining to deceased persons \* \* \* including the settlement, partition and distribution of estates of deceased persons." Appellant's counsel disowns making any contention that this provision of the organic law would be in the way of an independent administration where the acts done in such an administration are those only of the executors. The point made is that the statute (Sayles' Rev. Stats., art. 1996) authorizes the property of the estate to be disposed of through proceedings of other courts than the probate court, and in this instance the sales were involuntary as far as the executors were concerned and were in fact proceedings in the settlement of the estate had under the judgment orders of other courts than the one to which the Constitution has given exclusive jurisdiction in the settlement of estates.

We had the same constitutional provision in substance in the Constitution of 1845, and each subsequent one. See Paschal's Dig., pp. 58, 59; 2 Pasch. Dig., p. 1115, where probate jurisdiction was vested exclusively in the district courts; and the present Constitution, art. 5, sec. 16. In 1862 express provision was for the first time made for execution sales of the property of estates in the hands of an independent executor. 1 Pasch. Dig., art. 1371. Since that time our courts have uniformly sustained sales so made. Such being the well settled construction or effect attached to substantially similar constitutional provisions by the courts of the State, when the present Constitution was adopted in 1876, it must be presumed that the convention readopted it with the construction that had then been given it.

It seems to us that the question here raised would apply with the same force to the whole system of independent administration. If the contention were sound, then as to such administrations no real difference would seem to exist that is based on a distinction between voluntary acts of such an executor disposing of property and involuntary sales under execution.

Lest that part of our opinion holding that by the terms of the will it was not contemplated that the yearly reports of the executors should be approved or rejected by the court, may be construed to mean that if such action by the court had been permitted by the will the independent character of the executorship would have been destroyed, we deem it well to add that, in our opinion, if such power had been left with the court the independent character of the executorship in other respects would not have been disturbed. The statute does not restrict the matters pertaining to the estate that may be left in the hands of the county court by the terms of a will, but merely designate those matters that can not be dispensed with by a will.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



## P. H. CLARKE V. PRESIDIO COUNTY.

Decided March 9, 1904.

**County—Suit—Presentation of Claim.**

Suit could be maintained against a county for legal services, though the claim presented to the commissioners court, and only allowed in part, was in the form of a proposal to take, in case of immediate settlement, a less sum than that sued for.

Error from the District Court of Presidio. Tried below before Hon. A. M. Walthall.

*P. H. Clarke*, for plaintiff in error.

*J. A. Gillett*, for defendant in error.

FLY ASSOCIATE JUSTICE.—Appellant sued appellee to recover the sum of \$729.95 alleged to be due him by appellee for services performed as an attorney at law, and \$39.60 expenses arising in connection with such legal services. An exception was sustained to the first amended petition on the ground that it did not allege that the claim on which the suit was founded was presented to the County Commissioners Court for allowance and that such court had neglected or refused to audit or allow the same or any part thereof, and the court decreed that the appellant take nothing by his suit and appellee recover all costs of suit.

The following allegations appear in the amended petition:

“Plaintiff on the 15th day of August, 1899, duly presented his claim to defendant’s commissioners court in writing, now in possession of defendant, for allowance, for compensation for his said services and expenses and expressly in said claim in writing offered and declared himself willing to accept \$250 as an immediate compromise satisfaction discharge in law of the reasonable value of his said services, not including his said expenses, on condition, substantially that said sum and said expenses should be paid and allowed to plaintiff then without delay by said court. But said court, not accepting said proposition of compromise, failed and refused to allow said claim, and with reference thereto passed on said 15th day of August, A. D. 1899, the following order recorded on its minutes book No. 3 on page 590: ‘This day the account of P. H. Clarke for \$289.60 was presented to the court and the same was approved for \$164.60 conditioned that he give his receipt in full to the county in a certain county case represented by Davis, Beall & Kemp, in which the said P. H. Clarke was also employed, and in what is known as the Paducah case. And the clerk is hereby instructed that upon the execution and filing with him of said receipt above specified he may issue warrant as above stated, and not otherwise.’ Said Paducah case is the case for services in which plaintiff now sues.”

The allegations show that appellant presented his claim to the com-



missioners court "for compensation for his said services and expenses," referring, of course, to the services and expenses previously described in the petition, but it is not alleged what sum was demanded, the only sum mentioned being the amount he was willing to accept if the same was paid without delay. The claim was approved for \$164.60 upon the condition that it should be accepted as full payment thereof.

If it was intended to allege that the only amount designated in the claim presented to the commissioners court was that stated as a compromise, we think that the allegation of presentation of the claim and the rejection except for \$164.60 was sufficient. The county is a constituent part of the sovereign State, and in order to have the privilege of suing it the statute must be complied with, so that it may not be annoyed by suits that could be settled simply by presentation and investigation. The object is to put the representatives of the people of the county in possession of the facts in regard to the nature of claims and give notice before any legal proceedings can be instituted. The concern of the statute is not so much with the amount as the nature of the claim. It is the "claim upon which the suit is founded," or in other words the commissioners court must be informed of the cause of action. In construing a statute of similar import the New York Court of Appeals said: "It is obvious that the word 'claim' and the phrase 'cause of action' relate to the same thing and have one meaning. The plaintiff before suit had a 'claim' for damages; and this, when stated in a complaint, is technically 'a cause of action.' The amount of compensation to which she conceived herself entitled would not before suit, in any manner, vary or affect the claim; nor does its statement in the pleadings determine the relief to which she would be entitled. In both cases it depends upon the facts stated. The claim, or cause of action, is made out when the facts constituting it are established; and as alleged in the complaint, they were the same as theretofore set forth in the petition." *Minick v. City of Troy*, 83 N. Y., 514. In that case a claim for \$10,000 damages for personal injuries was presented to the city in which the facts upon which the claim was founded were stated. The claim was rejected and plaintiff filed suit for \$5000, stating the same facts. In this case a claim was presented to the commissioners court for attorney's fees and expenses rendered and incurred in a certain case for the county, an offer being made to take \$250 for the fee and \$39.60 for the expenses if paid at once. The suit is founded upon the same claim for legal services and expenses, the only difference being that appellant is seeking to recover the full value of his services instead of the amount he had expressed a willingness to accept on a compromise.

It is true that in the New York case the claim was one arising from a tort and the one now under consideration is for services rendered and expenses incurred by reasons of a contract with the county, the amount not being determined or agreed upon but depending on the services that might be rendered and expenses that might be incurred. In either



case the presentation of the claim was to give notice to the county or city of the nature of the demand. In this case the county was as fully notified by the claim presented as to what appellant demanded as though the full account had been made out and presented, and an offer to pay a certain sum less than what appellant agreed to accept as a compromise was a rejection of everything above that sum.

In analogous cases of presentation of claims to administrators and executors the same rule has been announced as hereinbefore stated. *Field v. Field*, 77 N. Y., 294; *Carter v. Beckwith*, 104 N. Y., 236.

There is some analogy, perhaps, between cases of this character and those in which demand is necessary as a condition precedent to suits, the rule in each being founded upon the same principle. In the case of *Donley v. Wiggins*, 52 Texas, 301, a sheriff had collected money on execution which it was alleged he had refused to pay on demand. The proof showed that a demand for settlement was made by an agent of the person to whom the money was due, who at the same time exhibited a list of the cases. The amounts were not named. The court held the demand sufficient.

We believe the allegations of the petition are sufficient to sustain the demand of plaintiff in error against defendant in error, and the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## R. H. FORRESTER v. J. E. BERRY.

Decided March 9, 1904.

**Public Land—Actual Settler—Proof of Occupancy.**

It was error for the trial court to exclude evidence offered to show that plaintiff was not an actual settler where defendant had settled on and made application to purchase the land in controversy before proof of occupancy was made by plaintiff to the Commissioner of the General Land Office. *Pardue v. White*, 21 Texas Civ. App., 121; *Logan v. Curry*, 95 Texas, 664, distinguished.

Appeal from the District Court of Frio. Tried below before Hon. E. A. Stevens.

*Magus Smith* and *R. W. Hudson*, for appellant.

*I. N. Spann* and *Mason Maney*, for appellee.

FLY, ASSOCIATE JUSTICE.—Appellee instituted this suit to try title to two parcels of land containing in the aggregate 960 acres, in Frio County. The court instructed a verdict for appellee, upon which the judgment from which this appeal was perfected was rendered.

Appellee owned a home within five miles of the lands in controversy and on May 5, 1899, applied to the Commissioner of the General Land Office to purchase 640 acres additional land, and on July 15, 1899, applied to purchase 320 acres more. The lands were awarded to him. On June 16, 1902, appellant made application to purchase the two tracts, the 640 acres as a home and the 320 acres as additional land. The application was rejected by the Land Commissioner. Appellant moved on the lands on June 9, 1902, for the purpose of making a home there, and still resides on the land. On August 2, 1902, appellee made his proofs of occupancy of the land for three years and the same was filed in the General Land Office on August 4, 1902. The proofs were on that day accepted by the Land Commissioner, but it is not made to appear that a certificate was issued. Prior to the time that the proofs had been filed affidavits setting up appellee's abandonment of the land had been filed by appellant with the Land Commissioner.

Appellant sought to show by witnesses, on the trial of the cause, that appellee had abandoned his home land before the expiration of three years from the date of his application, and had moved to the town of Pearsall in September, 1901, and had resided there continuously until the time of the trial. The testimony was excluded.

In our former opinion, which has been withdrawn, we reached the conclusion that the facts of this case brought it within the scope of the cases of *Logan v. Curry*, 95 Texas, 664, and *Pardue v. White*, 21 Texas Civ. App., 121, 50 S. W. Rep., 591, but we find that there is a feature of the evidence in each of those cases which, the Court of Civil Appeals of the Second District hold, distinguishes them from one like this, in



that the proofs of occupancy were made and accepted by the Land Commissioner before the adverse applications to purchase were made. *Lamkin v. Matsler*, 73 S. W. Rep., 970; *White v. Watson*, 2 Texas Law Journal, 445, 78 S. W. Rep., 237.

In article 4218j, Revised Statutes, it is provided that the purchaser of school lands shall be required to reside on the land for three consecutive years, and that he shall make proper proof of such residence and occupancy to the Commissioner of the General Land Office within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavit of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the Commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact.

This law was first construed by the Court of Civil Appeals of the Second District in the case of *Pardue v. White*, 21 Texas Civ. App., 121, 50 S. W. Rep., 591, and not only was a writ of error refused by the Supreme Court, but the decision has the unusual distinction of being cited and furthermore highly approved by the Supreme Court in the case of *Logan v. Curry*, 95 Texas, 664. In the *Pardue-White* case, it was held that when the proofs have been made by a purchaser, as required by the law above cited, and the certificate has been issued by the Land Commissioner, no person who makes application to purchase the land after the making of such proofs of occupancy and issuance of such certificate shall be allowed to open the question of the occupancy of the land by the original purchaser.

The Supreme Court not only highly commended the foregoing views of the Court of Civil Appeals, but seems to go further and intimates that after three years the question of occupancy can not be raised, and says: "Conceding that it was the intention of the Legislature to leave the title of a purchaser open in its inception to attack by an adverse claimant upon the ground that he was not an actual settler at the time of his application, or had abandoned the land subsequently thereto, sound policy would dictate that some limit should be fixed to this period of uncertainty; and we are of the opinion that three years would be a reasonable and sufficient time in which to permit the question to be contested." That language is broad enough to preclude any contest as to residence and occupancy after the expiration of three years, whether the proofs of occupancy had been made and accepted or not. That construction was placed on the language in the case of *Lamkin v. Matsler*, 73 S. W. Rep., 970, by the same court that rendered the opinion in *Pardue v. White*. The court said: "We think it is to be implied from the decision relied upon that there is nothing in our law that will prevent an actual settler who has complied with the statute in an effort to purchase school lands from showing that a previous award, made within less than three years from the date of his own application and settlement, was a nullity by reason of the fact that such prior award had



been made." However, that case was distinguished from the Logan-Curry case in that in the latter case the settlement and application to purchase took place after the proof of occupancy had been accepted and the certificate issued, and in the case of *White v. Watson*, 2 Texas Law Journal, 445, 78 S. W. Rep., 237, the same court held, without reference to the fact that three years had elapsed from the time of the award of the land before the settlement of the land and application of the adverse claimant to purchase, that if such settlement and application antedated the proofs of occupancy, the question of occupancy could be inquired into. In the case last cited no reference is made to the Logan-Curry case.

The matter has been settled by authoritative decisions, and while there is some uncertainty as to the exact holdings in the different decisions, we conclude that all of them support the decision that under the facts of this case the trial court erred in excluding evidence as to the occupancy of the land, because the settlement and application for purchase on the part of appellant occurred before the proofs of occupancy were made by appellee.

The motion for rehearing is granted and the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## JOHN M. RUCKER V. Y. B. CAMPBELL.

Decided March 10, 1904.

**1.—Contract—Re-engaging in Business—Liquidated Damages—Injunction.**

Where the parties to a stipulation, on the sale of a business, against re-engaging therein within named limits agreed on the liquidated damages to be recovered in case of breach, the purchaser was limited to such remedy and could not have injunction against a breach of the stipulation.

**2.—Liquidated Damages—Penalty.**

A contract fixing the damages for breach of a contract not to re-engage in business treated as one for liquidated damages and not as a penalty.

**3.—Injunction—Remedy at Law.**

Where the damages for breach of a contract are fixed by agreement and the defendant is not insolvent the remedy at law is complete, and injunction will not lie to restrain a breach.

**4.—Jurisdiction—Amount in Controversy—Injunction.**

Where damages are liquidated, and their amount too small to give the court jurisdiction, and no right to the injunction claimed in support of the jurisdiction is shown, the case should be dismissed.

Error to the District Court of Smith. Tried below before Hon. J. Gordon Russell.

*Johnson & Edwards*, for plaintiff in error.

*F. J. McCord* and *N. A. Gentry*, for defendant in error.

GARRETT, CHIEF JUSTICE.—The plaintiff in error brought this suit in the District Court of Smith County against the defendant in error, alleging that the defendant had sold to the plaintiff his business as cotton weigher and had agreed not to engage in that business in the city of Tyler after April 1, 1901, and that the defendant had violated his agreement not to resume business, and was insolvent and unable to respond in damages, wherefore plaintiff prayed for an injunction to restrain the defendant from again doing business as cotton weigher in the city of Tyler. The contract was in writing and was attached to the petition as an exhibit and made a part thereof. The defendant pleaded that the contract entered into between the plaintiff and defendant stipulated that in the event it should be violated by the defendant the plaintiff should recover of him and he should be liable to pay the plaintiff the sum of \$200 as liquidated and agreed damages for such violation, and that the defendant was solvent and able to pay said amount, and that the plaintiff had a complete and adequate remedy at law and was not entitled to the writ of injunction, and asked that the bill be dismissed. The cause was submitted to the court without a jury and the court rendered judgment enjoining the defendant from again engaging in business as cotton weigher in the city of Tyler until the defendant should have "paid or lawfully tendered to the plaintiff, John M. Rucker, the sum of two hundred (\$200) dollars in lawful money." The plaintiff complains of so much of the judgment as vacates the injunction upon payment by the defendant of the sum of



\$200. The defendant has cross-assigned error upon the action of the court in granting the injunction and in not dismissing the suit for want of jurisdiction.

The contract is dated February 15, 1901, and is signed by the defendant, Campbell. The defendant sold to the plaintiff in consideration of the sum of \$100 his business of "cotton weighing in the said city of Tyler heretofore conducted and carried on in the eastern part of said city on a lot situated between East Ferguson Street and East Erwin Street in said city, together with all scales, weights, stencils and all property of whatever kind or character belonging to or used in connection with said business." It was stipulated, "And I also hereby further agree and bind myself not to engage in or carry on or be in any way interested in any cotton weighing business in said city of Tyler \* \* \* after the said 1st day of April, 1901, \* \* \* and for the consideration aforesaid hereby transfer and convey unto the said John M. Rucker my good will and influence in his behalf and interest in the said business which he will carry on and engage in after said date. \* \* \* And it is further understood and agreed that in the event I shall violate this contract or any portion of the same deliberately or intentionally, then the said Rucker shall be entitled to recover against me, and I do hereby agree to pay him, the sum of two hundred dollars as liquidated and agreed damages for such violation." The defendant violated his agreement not to engage again in the cotton weighing business. It was shown by the evidence that the defendant was solvent.

Injunction will lie to restrain the violation of a contract restricting one in the exercise of his trade or profession within a specified locality, or a given period of time. 2 High. on Injunc., sec. 1167; Welsh v. Morris, 81 Texas, 159. But as stated by Mr. High, "The jurisdiction in cases of this nature is based upon the ground that the parties can not be placed in statu quo, and that damages at law can afford no adequate compensation, the injury being a continuous one and irreparable by the ordinary process of the courts of law." 2 High on Injunc., sec. 1168. In Wilkinson v. Colley, 164 Pa. St., 35, the court had under consideration the contract of a physician, who for a consideration of \$200 sold out to another physician and agreed not to engage in the practice of his profession or to manufacture or sell medicine at Lehman Centre or within eight miles thereof for a period of ten years, for the true performance of which he bound himself in the penal sum of \$400. The court held that the sum stipulated was a penalty and not liquidated damages, and treating it as a penalty held that although an action at law would lie for a breach of the agreement, stated the rule as well settled, "if there is an utter uncertainty in any calculation of damages from the breach of the covenants, and the measure of damages is largely conjectural, equity will intervene because of the inadequacy of the remedy." The rule, however, is also that when the parties have stipulated what the damages shall be in event of a breach and they are



such as the law will regard as stipulated damages, there is an adequate remedy at law and an injunction will not be granted. *High on Injunc.*, and *Wilkinson v. Colley*, supra. If, then, the damages to be paid by the defendant in this case be treated as stipulated and not penal, they would be rendered certain by the agreement of the parties and there would be no ground for injunction. While the law favors a construction of the contract that would treat the sum named as damages for a violation of the contract as penal rather than as stipulated damages, the right of the parties to contract is fully recognized and the agreement will be construed according to the intent of the parties as gathered from the instrument in the light of the surrounding circumstances, and contracts such as the one under consideration, where parties have bound themselves not to engage in business within a specified time or place, have usually been construed and enforced as for stipulated damages. *Field on Dam.*, secs. 137 et seq.; 1 *Suth. on Dam.*, secs. 283, 291; *Eakin v. Scott*, 70 Texas, 442; *Indianola v. Railway Co.*, 56 Texas, 606; *Yetter v. Hudson*, 57 Texas, 604; *Engelhardt v. Batla*, 31 S. W. Rep., 324; *Tobler v. Austin*, 22 Texas Civ. App., 99, 53 S. W. Rep., 706. It is clear from the contract under consideration that the parties agreed upon the sum of \$200 to be paid in full of all damages resulting from a breach thereof and that it was the intention of the parties that the payment of such sum should discharge the contract. The cases cited in support of the right to an injunction construe article 2989 of the Revised Statutes as providing for the writ independently of the question of whether there may be an adequate remedy at law if the applicant for the writ shows that he is entitled to the relief demanded, and that in order to give such relief the restraint of some act is necessary. *Sumner v. Crawford*, 91 Texas, 129; *Green v. Gresham*, 21 Texas Civ. App., 601, 53 S. W. Rep., 383; *McFarland v. Wilder*, 54 S. W. Rep., 267. In these cases the restraint of some act is necessary to the relief demanded. In a case where the parties have agreed in advance what the remedy for the violation of the contract shall be and fixed the damages, then there is no act necessary to be restrained in order to afford the relief. The remedy is an action for the recovery of the stipulated sum. The court below correctly held that the contract was for stipulated damages and its judgment was in effect a judgment for the sum stipulated, but there was no ground for the injunction and it was error to attempt to enforce the payment of the amount adjudged by injunction. The petition disclosed the want of jurisdiction to grant the writ of injunction from the facts set up therein, and the amount being below the jurisdiction of the court the writ should have been denied and the petition dismissed. *Telegraph Co. v. Arnold*, 9 Texas Ct. Rep., 343. The judgment of the court below will be reversed and such judgment as it should have rendered will be here rendered.

*Reversed and dismissed.*

Writ of error refused.



## JOHN C. PENN v. TEXAS YELLOW PINE LUMBER COMPANY.

Decided March 10, 1904.

**Deed—Description of Land—Parol Testimony.**

A contract for the sale of land describing it as "the 6100 acres under consideration in Tyler County," held not sufficient to comply with the statute of frauds nor to afford a basis for the admission of parol testimony to identify the land.

Appeal from the District Court of Harris. Tried below before Hon. Chas. E. Ashe.

*Andrews & Ball*, for appellant.

*Coleman & Abbott* and *E. P. & Otis K. Hamblen*, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellant brought this suit against the appellee to enforce specific performance of the following contract for the sale of land:

"HOUSTON, TEXAS, December 6, 1902.

"Mr. John C. Penn: I agree to convey to you the 6100 acres under consideration, in Tyler County, for \$1.62½ per M. feet for the standing timber on said land; one-third cash, one-third in one year, and one-third in two years, vendor's lien and 6 per cent interest; you to appoint an estimator and I one, and they to agree, and should they fail to agree they to appoint a third, whose decision shall be final, and you to agree not to buy west of Cypress and Mill Creek; \$2500 forfeit money to put up by you, to be closed in forty days. I will furnish abstracts showing good titles to said land. No timber to be cut unless paid for before cutting and indorsed on vendor's lien notes.

"J. I. CAMPBELL,

"Pres. Texas Yellow Pine Lumber Co."

"HOUSTON, TEXAS, December 6, 1902.

"Mr. J. I. Campbell: I have accepted the proposition of which the above is a copy, and have handed you, through Mr. J. M. Coleman, the \$2500 mentioned as forfeit money.

"JOHN C. PENN."

The petition describes several surveys of land in Tyler County, Texas, aggregating 6100 acres and after setting out the contract above copied alleged as follows:

"That said writing did not state in minute detail the contract between the parties, nor was it so understood nor intended by the parties. It was and is a memorandum of the contract so made between the parties, and plaintiff alleges that both parties to said contract fully and mutually understood said contract to be and mean, and the memoran-



dum thereof in writing to be and mean in detail and in substance, and in fact, as hereinafter stated, as follows:

“(a) That the land referred to in said contract and designated therein as ‘the 6100 acres under consideration in Tyler County,’ was and is, and was and is mutually understood between the parties to be the same lands hereinabove described; that the lands hereinabove described were the lands under consideration in Tyler County, comprising 6100 acres, the title to which stood in the name of the defendant, and the same were and are the only lands ever under consideration between the parties to this suit in negotiation of sale, and were and are the same lands referred to in said contract of sale; that the plaintiff and the defendant, the defendant acting through its officers and agents, had for some days prior to the signing of the contract hereinabove set out, been considering the purchase and sale of said lands hereinabove described; that the defendant, acting as aforesaid, had taken a map of Tyler County, spread it out before and shown it to the plaintiff and pointed out and designated thereon the different surveys and parts of surveys which the defendant desired to sell and the plaintiff desired to buy, stating definitely and specifically in each instance the original survey, the number of acres owned therein by the defendant, which it desired to sell to the plaintiff, its location in said survey, and pointing out and designating each tract separately, particularly and specifically; that the defendant, acting as aforesaid, also furnished to the plaintiff during said negotiations, and prior to the signing of said contract, a written statement giving the name of each survey, and the number of acres in each survey which the defendant desired to sell and the plaintiff wished to purchase, and that in every instance and on every occasion the defendant designated to the plaintiff the identical lands described in this petition, and none other; that the defendant and plaintiff never negotiated concerning any other lands, and never had any other lands under consideration than those hereinabove described; that after the making of said agreement and contract, the execution thereof and its acceptance as herein alleged, the defendant, acting in pursuance thereof, furnished to the plaintiff abstracts of title to the various tracts of land herein described, describing in the said abstracts each tract of land specifically and particularly, and being in every instance the same land described in this petition and none other; that in further pursuance of said contract, agreement and understanding, the defendant had said lands surveyed out, the lines thereof marked and designated on each and every tract thereof, and that said land comprised the same tracts of land and the same land described herein, as marked and designated by the defendant; that the plaintiff, in pursuance of the performance of his part of the said contract, and with the full knowledge of defendant, its agents and servants, employed counsel to examine the abstracts of title to the said several tracts of land so furnished to him by the defendant, and was required to spend



and agreed, bound and obligated himself to spend large sums of money for such service; that the plaintiff further incurred a large expense, and was compelled to spend, and did spend, and obligated himself to spend large sums of money to have said several tracts of land inspected by competent inspectors and the timber estimated thereon, as provided for in said contract, and that in pursuance of said contract, both the plaintiff and the defendant sent their estimators upon said lands to have the same inspected and estimated, and did have the same inspected and estimated, and the land so inspected and estimated was the identical land described in this petition, and none other, and plaintiff says that the designation of said land upon the map of Tyler County, as aforesaid, and in other ways hereinabove alleged, thoroughly, completely, and in every particular, identified said lands, and that said lands were actually marked and designated on said map by the defendant and in the written memorandum given by the defendant, acting through its officers and agents, to the plaintiff, of the several tracts of land herein described, the defendant in each instance in said memorandum so given by it to the plaintiff, gave the name of the survey and the number of acres in each survey which had theretofore been, and contemporaneously therewith was designated upon said map of Tyler County by the defendant as aforesaid. This plaintiff says that the defendant is estopped to deny that said contract is insufficient as to the description of said lands and each and every part thereof, because the defendant induced the plaintiff to rely upon its representations made as aforesaid, and to spend his money and time in pursuance of said contract, as aforesaid, based upon said representations of the defendant, so made to it in writing and otherwise, as aforesaid."

To this petition the defendant presented the following special demurrers:

"1. Further demurring and excepting, the defendant says that the contract sued upon—now for the first time set forth by plaintiff in *haec verba*—a copy of which contract is set forth on page 5 of said second amended original petition, is wholly insufficient for plaintiff to maintain this suit upon, and is contrary to the statutes of fraud, in that it wholly fails to describe any lands, or to furnish the means of description of any lands that were to be conveyed; on all of which defendant now prays judgment of the court.

"1a. Defendant further excepts to so much of plaintiff's second amended petition contained in paragraph (a), on pages 5, 6 and 7, setting forth that defendant furnished abstract of title to the lands described, and furnished maps of said lands and pointed out the tracts of land described, and had said lands surveyed, and the other acts therein contained alleged to have been done by defendant, and says same are insufficient, as it nowhere appears therefrom that defendant signed any of said instruments or referred to said instruments in the contract, or ever signed any written memoranda or other memoranda,



identifying or describing said lands, and now prays judgment of the court.

"2. Defendant excepts and demurs to all of said second amended original petition included in the second paragraph of said petition, wherein said petition undertakes to describe the lands alleged to have been intended to be conveyed by said contract, and says the same is wholly insufficient, and is contrary to the statutes of fraud, and that plaintiff thus seeks to ingraft upon said written contract and agreement a description which is wholly wanting in said contract, and now excepts to the same and prays the court to strike the same from the records."

These demurrers were sustained by the trial judge, and plaintiff declining to amend, his suit for specific performance was dismissed, but upon confession of defendant judgment was rendered in favor of plaintiff upon the alternative prayer of the petition for the recovery of the \$2500 paid by plaintiff to defendant as forfeit money.

The only question presented upon this appeal is whether the trial court erred in sustaining the demurrers above set out.

We think the description of the land contained in the contract is wholly insufficient to identify the land attempted to be described, and the contract furnishes no means by which said land can be identified with reasonable certainty. The case presented is not one calling for the application of the rule which permits the introduction of parol evidence to explain an ambiguity in the description of land contained in a deed, but the question is whether a failure to describe the land in a contract of sale so that it can be identified can be supplied by parol evidence showing what land was in contemplation of the parties in making the contract. It is well settled that a contract for the sale of land to be sufficient under the statute of frauds must describe the land to be conveyed or must furnish the means by which the land can be identified with reasonable certainty. *Patton v. Rucker*, 29 Texas, 409; *Jones v. Carver*, 59 Texas, 295; *Johnson v. Granger*, 51 Texas, 44; *Zanderson v. Sullivan*, 91 Texas, 503; *Cammack v. Prather*, 74 S. W. Rep., 355; *Cusenbury v. Latimer*, 28 Texas Civ. App., 217; *Norris v. Hunt*, 51 Texas, 615.

The only language in the contract descriptive of the land agreed to be sold is "the 6100 acres under consideration in Tyler County." This language only informs us that the land contracted to be sold is situated in Tyler County and consists of 6100 acres, and it is manifest that the land can not be identified from this description. The words "under consideration" add nothing to the description of the land, since they only refer to the mental attitude of the parties toward the land, which from the allegations of the petition is only susceptible of proof by parol. To permit the appellant to show by parol what land was under consideration would be in effect to abrogate the rule requiring contracts for the sale of land to be in writing. If the appellant's contention is sound the contract would be enforceable if it only described the land



as that "under consideration," since the designation of the number of acres and the county in which the land is situate is clearly insufficient to identify it with reasonable certainty, and the entire description must be supplied by parol proof showing what land was under consideration by the parties.

We think the cases of *Cunynus v. Lumber Co.*, 20 Texas Civ. App., 290, 48 S. W. Rep., 1106, and *Taffinder v. Merrell*, 95 Texas, 95, cited by the appellant, are easily distinguishable from the present case. In the cases cited the description was held sufficient because the extrinsic facts alleged and proven eliminated all ambiguity therefrom and made the identity of the land certain from the description contained in the deed. In the present case the extrinsic facts alleged in the petition, and which are only susceptible of proof by parol, must be looked to primarily to obtain a description sufficient to identify the land; in other words, the identity of the lands is dependent entirely upon parol evidence.

We think the judgment of the court below should be affirmed, and it is so ordered.

*Affirmed.*

Writ of error refused.



CHICAGO, ROCK ISLAND & TEXAS RAILWAY COMPANY v.  
R. MARTIN ET AL.

Decided March 12, 1904.

**1.—Contributory Negligence—Riding on Freight Train.**

Where, in violation of the known orders of the railroad company, though with the permission of the conductor, deceased took passage on a freight train, and voluntarily assumed a dangerous position thereon, going upon an open flat car instead of into the caboose, and was killed through a derailment of the train caused by running it at an excessive rate of speed over a rough track, he was guilty of such contributory negligence as precluded a recovery for his death. Following *Railway v. Rogers*, 93 Texas, 677.

**2.—Same—Charge Assuming Negligence.**

Under such facts the court would have been warranted in giving a charge which assumed that deceased was guilty of contributory negligence in so riding upon the train if he knew the rule was in force forbidding persons to ride on freight trains, and that the officers of the company were trying to enforce the rule, although the conductor may have given him permission to ride thereon.

**3.—Same—Duty Toward Trespasser—Excessive Speed.**

Running a freight train at an excessive rate of speed is not in itself such a reckless disregard of human life as will render the company liable for the death caused thereby of one who is a trespasser on the train.

Appeal from the District Court of Wise. Tried below before Hon. J. W. Patterson.

*N. H. Lassiter, Robt. Harrison, and T. J. McMurray*, for appellant.

*R. E. Carswell*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—Joe Martin, a boy over 16 years old, was killed February 11, 1903, in a wreck caused by the negligence of appellant's servants in running a freight train, on which he was riding, at a dangerously high rate of speed over a rough track, which resulted in breaking the flange of a wheel and the derailment of the train.

The deceased, according to the allegations of the petition, was "well grown and of good judgment for a person of his age;" and, according to the testimony of his father, "was a very bright boy, quick to catch on, attentive, and intended to make a railroad man of himself." He was familiar with the operation of railroad trains, and, it is not to be doubted, knew it was against the rule of the company for him to ride on a freight train. While the evidence warranted a finding that the train crew knew he was on the train, and even that the conductor had invited him to ride, though it was conflicting on this issue, and that they were guilty of negligence in running the train over a rough track at a rate of speed as high as sixty or sixty-five miles an hour, it also showed that deceased chose perhaps the most dangerous place on the train—a flat car about the middle of a long freight train—and that he would not have been hurt if he had been in the caboose.

We see no escape from the conclusion that in thus undertaking to



ride on a freight train, in known violation of an established rule of the railway company, even at the invitation of the conductor, the deceased was guilty of such contributory negligence as precludes the recovery sought and obtained by his parents in this case. It is not pretended, or at least the case was not tried on that theory, that the conductor or others engaged in the operation of the train showed such a reckless disregard of human life in the manner of running the train as to warrant the inference that they intended to kill or injure the deceased. Nor is it pretended or can it be maintained that the relation of carrier and passenger existed. The full extent of appellant's duty therefore was that of exercising the care of a person of ordinary prudence not to injure the deceased, and this, with contributory negligence, was the only issue submitted in the charge. *Wilcox v. Railway*, 11 Texas Civ. App., 487, 33 S. W. Rep., 379; *Houston & T. C. Ry. Co. v. Sympkins*, 54 Texas, 618; *Texas & P. Ry. Co. v. Watkins*, 88 Texas, 20, 29 S. W. Rep., 233; *Missouri K. & T. Ry. Co. v. Rodgers*, 89 Texas, 675, 36 S. W. Rep., 243; *Gulf C. & S. F. Ry. Co. v. Cunningham*, 30 S. W. Rep., 368. In the case first cited, which was quite similar to the one before us, Justice Williams, after announcing that one taking a free ride, with the assent of the employes, against the known rules of the company, was not a passenger, used this language: "It does not follow that because he was not a passenger he had no rights whatever. There was the duty resting upon those operating the engine, if they knew of his presence, to avoid injuring him so far as by the exercise of ordinary care they could do so. A failure to exercise such care may be admitted to have been a breach of the duty which the circumstances imposed upon them; and if he could escape the charge of contributory negligence, appellant might have had a right to recover." Then follows a discussion of the issue of contributory negligence, which seems altogether appropriate to the facts of this case, leading to the conclusion that the person injured, in that instance by a derailment of the engine due to the high rate of speed at which it was negligently and recklessly run, could not recover because of his own negligence in getting on the engine and riding on the footboard thereof, although this was done with the knowledge of those operating the engine, they having given him permission to ride. It was distinctly held in that case, in which writ of error was refused, that recovery should be denied "one injured by the mere negligent running of the engine, when, at the time of the injury, he is, without right to be there, in a situation where his mere presence is negligence." The opinion of Justice Brown in *Railway v. Rodgers*, 89 Texas, 675, is to the same effect, as are also the following, among other cases, decided by the Courts of Civil Appeals: *International & G. N. Ry. Co. v. Hanna*, 58 S. W. Rep., 548; *Missouri K. & T. Ry. Co. v. Tonahill*, 16 Texas Civ. App., 625, 41 S. W. Rep., 875.

The court therefore erred in not granting a new trial on the ground that the deceased was guilty of contributory negligence.

We are also of opinion that the facts of this case would have war-



ranted the court in giving the following charge requested by appellant, notwithstanding the general rule prohibiting the judge from charging the jury that given facts constitute negligence when the law has not so declared: "The defendant asks the court to charge the jury that if they believe that at the time Joe Martin boarded this train, the same was a freight train, equipped and prepared only for the carriage of freight; that he took an extra hazardous position upon it and was thus injured, and that the defendant company had in force at said time a rule and bulletin prohibiting the carrying of passengers upon this freight train, and that the deceased knew at the time he boarded this freight train and knew at the time the said train was wrecked that said rule was in force, and that the officers of said company were trying to enforce the same, and the train crew had no right to relax or abrogate said rule, then you will find for the defendant, even though you may believe that the conductor of said train knew and consented to deceased riding on said train."

*Reversed and remanded.*

ON MOTION FOR REHEARING.

The motion for rehearing is overruled. But in obedience to the suggestion therein made judgment will be here rendered in favor of appellant, the appellees, as we construe their suggestion, having waived their right to have the cause remanded.

Writ of error refused.



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY ET AL. v.  
H. M. CLARK.

Decided March 12, 1904.

**1.—New Trial—Admission by Prevailing Party.**

Plaintiff sued three railroad companies for injuries to cattle occurring on a through shipment, alleging delays and negligence on each line, and recovered judgment in separate amounts against each defendant. After the case had gone to the jury he stated to witnesses for two of the roads that he did not know why they were brought to court, as he had no complaint to make against those two roads on account of delays or treatment of the cattle while in their possession, as the injury occurred on the third road. Held to require the granting of a new trial on the ground of newly discovered evidence.

**2.—Contract—Signature.**

It is not essential to the validity of a contract that the signature of the parties should be at the foot of the instruments where such contracts are usually signed.

**3.—Carriers of Freight—Duty to Feed, Water and Rest Cattle En Route.**

Railroad companies are not under the absolute duty of unloading a shipper's stock en route for rest, feed and water upon his request, without regard to the reasonableness or necessity of the request.

Appeal from the County Court of Midland. Tried below before Hon. L. M. Murphy.

*Bryan & Whitaker*, for appellants.

*Camp & Caldwell*, for appellee.

SPEER, ASSOCIATE JUSTICE.—The shipment of cattle, for damages to which this suit was brought, originated at Monroe City, Mo., and was destined to Midland, Texas, via the Missouri, Kansas & Texas Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, and the Texas & Pacific Railway Company. The trial resulted in a judgment against the Missouri, Kansas & Texas Railway Company for \$125, and against the Missouri, Kansas & Texas Railway Company of Texas for \$62.50, and against the Texas & Pacific Railway Company for \$62.50. The Texas & Pacific company has not appealed.

Appellants' first assignment of error is overruled, because the complaint therein stated is not sustained by the charge referred to. The court gave no such charge as that indicated in the assignment of error. The court did err, however, in refusing to grant to appellants a new trial on account of the newly discovered evidence of the witnesses Henshaw, Matthews, Hall and McClurg. It appears from appellants' motion, which is duly supported by the affidavits of the persons mentioned, that after the evidence had been heard in the trial of the case and the arguments of counsel had for the most part been made, appellee, Clark, stated to the witnesses that his cattle arrived in Fort Worth, Texas, in good condition; that they received a good run over the lines of these



appellants until they arrived at Fort Worth, and that he did not know why the railway companies had caused these parties to report to Midland, Texas, as witnesses in the case, as he had no complaint to make against appellants on account of delays or on account of the treatment by them of his stock while same were in their possession until they had delivered said cattle at Fort Worth, Texas. We think these statements not only would be competent evidence, but that they are material admissions against interest, and since the same were not known to appellants until after the case was submitted to the jury, the court should have sustained the motion based upon such newly discovered evidence, and should have granted to appellants a new trial. It is insisted by appellee that, since he did not accompany the shipment of cattle, and could not therefore have known of the exact treatment of his cattle while in charge of the appellant lines, his admissions should not cause the reversal of the judgment, because necessarily his statements were in respect to a matter of which he knew nothing, and about which he did not testify upon the trial. This, we think, should not alter the rule which allows the introduction in evidence of the admissions made by a party against his interest. Furthermore, the evidence disclosed that he at least inspected the cattle at one point while en route. It is undisputed that he had an opportunity to observe the condition of the cattle at Fort Worth. A reference to his petition, upon which the cause was tried, discloses that he distinctly alleged the delays and other negligence as against the appellants before the cattle reached Fort Worth. No replication of any kind was filed to appellants' sworn motion, and it is thus tacitly admitted that appellee made such statements. A new trial should have been granted. *Houston & T. C. Ry. Co. v. Forsyth*, 49 Texas, 171; *Welsh v. Nasboe*, 8 Texas, 189.

In view of another trial we will suggest that the contract offered in evidence by appellants was probably admissible and should not have been excluded as it was distinctly pleaded and no denial was interposed by appellee of its authenticity, and the objection urged by him, and sustained by the court, could not properly be interposed under these circumstances. It is not essential to the validity of the contract that the signature of the parties should be at the foot of the instrument where such contracts are usually signed.

It was also error for the court to instruct the jury that it was the duty of the defendants, and each of them, to unload plaintiff's stock for feed, water and rest when requested so to do by the plaintiff or his agent in charge of said stock. Railroad companies are not under the absolute duty of unloading a shipper's stock for rest, feed and water upon his request. Their duties in this respect are well defined by the decisions. They should afford proper facilities and reasonable opportunities for rest, feed and water, but are not required to supply these upon a mere request of the shipper without regard to the reasonableness



or necessity of the demand. Sayles' Civ. Stats., art. 326; U. S. Comp. Stats., sec. 4386; Fort Worth & D. C. Ry. Co. v. Daggett, 87 Texas, 329, 28 S. W. Rep., 525; International & G. N. Ry. Co. v. McRca, 82 Texas, 615, 18 S. W. Rep., 672; International & G. N. Ry. Co. v. Lewis, 23 S. W. Rep., 323; Texas & P. Ry. Co. v. Byers, 73 S. W. Rep., 427; Texas & P. Ry. Co. v. Stribling, 34 S. W. Rep., 1002.

*Reversed and remanded.*



## B. B. WILSON v. MARY WILSON ET AL.

Decided March 12, 1904.

**1.—Evidence—Reading Deposition—Witness at Trial.**

Where plaintiff was present and testified at the trial, and defendant's counsel, in cross-examination and for the purpose of impeaching her, interrogated her as to certain answers she had made in a deposition of hers on file in the case, it was admissible for her to read in evidence, from the deposition, her answer to one of the interrogatories therein.

**2.—Same—Rule Stated—Judicial Discretion.**

The matter of permitting the deposition of a witness to be read in evidence after he has testified on the trial rests largely in the discretion of the trial court, and its action therein will not be ground for reversal unless it is made to appear that such discretion has been abused to appellant's injury.

**3.—Trespass to Try Title—Improvements and Rental Value.**

In trespass to try title and cancel a deed where the undisputed evidence showed that the rental value of the premises during the period of defendant's possession and use thereof exceeded the value of his improvements, there was no basis upon which the jury could have predicated a verdict in his favor for the value of the improvements, and the court did not err to his prejudice in omitting to submit such issue.

**4.—Same—Delivery of Deed.**

In such action, while counsel for defendant was arguing the law to the court, the court stated that it did not desire to hear argument on the question of the delivery of the deed, as the jury would be charged, as an undisputed fact, that the deed was delivered. Such charge was not given, but the delivery of the deed appears to have been treated by the court and all the parties litigant as an established fact. Held, that defendant was not injured in being misled and deprived by the remark of the court of the benefit of an argument to the jury on the matter of the delivery of the deed.

**5.—Same—Cancellation of Deed for Fraud—Evidence.**

The fact that the deed from plaintiff to defendant, her son, was absolute on its face and was delivered to defendant, would not prevent plaintiff, under proper allegations, from showing that the agreement was that it was not to take effect until plaintiff's death, and its consideration was to be that the grantee would support her during her life, and that she was to retain control of the premises, and that she was unable to read, and signed the deed relying upon the grantee having prepared it in accordance with the agreement. There was no assent of the grantor's mind to the deed that was executed, absolute in terms and reciting the consideration to be one dollar and love and affection.

Appeal from the District Court of Wood. Tried below before Hon. R. W. Simpson.

*M. D. Carlock*, for appellant.

*D. W. Crow* and *W. B. Teagarden*, for appellees.

TALBOT, ASSOCIATE JUSTICE.—This suit was instituted by appellees, Mary Wilson and others, on the 2d day of October, 1902, in the form of an action of trespass to try title and to cancel a deed made by the said Mary Wilson to appellant on January 21, 1901, for the land in controversy and to recover rents. Subsequently all the plaintiffs, except appellee and Mrs. Dora Thompson, who, joined by her husband, claimed only two acres of the land, dismissed their suit, and the cause proceeded to trial with these remaining plaintiffs. Appellant



disclaimed any title to or interest in the two acres claimed by Mrs. Thompson, and the only controversy on the trial was between appellee, Mary Wilson, and appellant, B. B. Wilson. Appellant answered by general demurrer, plea of not guilty, and alleged improvements in good faith. The trial resulted in a verdict and judgment in favor of appellee, from which this appeal is prosecuted. The evidence is conflicting, but we believe the following conclusions are warranted thereby:

Appellee was the mother of appellant, and the widow of Bryant Wilson, deceased. The land in controversy was the community property of appellee and Bryant Wilson, and was their homestead at the date of the latter's death. Appellant had resided on the land with his father and mother before the death of his father, and continued to so reside with his mother after his father's death. Mrs. Dora Thompson and the other plaintiffs were the children and grandchildren of Mary and Bryant Wilson. On January 21, 1901, appellee executed and caused to be delivered to appellant a deed purporting to convey to him the whole of the land in controversy and to take immediate effect. Before the execution of this deed appellee agreed with appellant to give him her one-half of the land in controversy and to make him a deed therefor, in consideration that he would maintain and support her during the remainder of her life. But it was further agreed that said deed was not to become operative and the title to the land pass and vest in appellant until the death of appellee, and that during her lifetime she should have the management and control of the premises. With this understanding appellee directed appellant to have a deed prepared incorporating therein the terms of their agreement. Appellant caused the deed, dated January 21, 1901, to be prepared, and appellee signed and acknowledged its execution, thinking and believing the same was in accordance with their previously made agreement. The deed, however, was not in keeping with that agreement, but on the contrary was an absolute deed on its face, purporting to convey the entire land and to pass and vest in appellant the present title thereto, in consideration of love and affection and the sum of one dollar. The deed was a general warranty for all the land, and did not contain stipulations to the effect that appellee was to retain the control and management thereof during her life; that appellant was to maintain and support her, and that the title to said land was not to pass to appellant until the death of appellee.

Appellant had the deed recorded immediately after its execution and turned it over to appellee, with instructions to keep it among her other papers until her death, but she could not read and did not know its terms and contents and did not know that it failed to contain the provisions agreed upon between her and appellant until a short time before the institution of this suit. Appellee was very old, feeble and illiterate, and the deed was not read or its contents made known to her by the notary public who took her acknowledgment thereto, or by



anyone else until she left appellant's house. Some time after the execution of the deed appellee became dissatisfied with the treatment she was receiving at the hands of appellant's wife and left his house and went to her daughter's, Mrs. Dora Thompson's, to reside. She carried the deed in question with her, and her daughter read the deed to her and explained its contents. This was the first time she knew the agreement made with her son, the appellant, had not been incorporated in the deed. Upon ascertaining the nature and effect of the deed appellee brought this suit.

*Opinion.*—It appears that appellee's deposition had been taken prior to the trial, and she proposed to read in evidence her answer to one of the interrogatories propounded to her, after she had testified orally. To this appellant objected upon the ground that the witness was present in court and her deposition for that reason inadmissible. The objection was overruled and this action of the court is made the basis of appellant's first assignment of error. The objection is not well taken. The practice of permitting the deposition of a witness to be read in evidence after such witness has testified on the trial is left very largely to the discretion of the trial court, and a ruling adversely to the party objecting will afford no ground for a reversal of the judgment unless it is made to appear that such discretion has been abused to his injury. *Schmick v. Noel*, 64 Texas, 406. Besides, in this case while the appellee was on the stand appellant's counsel interrogated her as to certain answers and statements she had made in the deposition, with a view to impeach her by showing her statements made on the witness stand were contradictory of those made on the same subject in the deposition. It was then appellee offered the answer objected to, which related to the matters on which she had been interrogated by appellant's counsel for the purpose of sustaining the witness by placing before the jury all that was testified to on the same subject. This she was entitled to, and there was no error in the court's ruling.

The court did not err in omitting to submit the question of improvements alleged to have been made by the appellant in good faith upon the land in controversy, or to give appellant's special charge requested in relation thereto. The undisputed evidence showed that the rental value of the premises during the period of appellant's possession and use thereof exceeded the value of appellant's improvements. There was no evidence of the value, at the time of trial, of such improvements as had been made before the filing of the suit. Neither was there any evidence from which the jury could determine to what extent such improvements had enhanced the value of the land, or the present value of the premises without the improvements. The burden of proof was upon the appellant to establish by the evidence the questions of value referred to, and having failed to do so, there was no basis in the evi-



dence upon which the jury could have predicated a verdict for improvements.

Appellant's sixth assignment of error complains of the failure of the court to charge the jury to the effect that the undisputed evidence showed that the deed dated January 21, 1901, had been delivered to appellant. The ground of complaint is, that while counsel for appellant was arguing the law of the case to the court, the court stated to him that it did not desire to hear any argument on the question of the delivery of the deed; that the court was going to charge the jury as an undisputed fact that the deed referred to was delivered. It is urged that counsel was misled by this action of the court and his client deprived of the benefit of an argument to the jury upon that question to his prejudice.

We fail to see how appellant was injured by reason of the matter complained of. The undisputed evidence showed that the deed, as a fact, had been delivered to appellant. It was not submitted as an issue to be passed upon and decided by the jury. There was no special charge requested upon the subject, and it seems to have been treated by the court and all parties to the litigation as an established fact. It does not appear, and it is not at all likely, that the failure to charge as indicated by the court he would do, influenced the jury in any degree to the injury of appellant.

Complaint is made of the following paragraph of the court's charge: "If you find that Mrs. Mary Wilson and her son B. B. Wilson mutually agreed between themselves that she would give to B. B. Wilson one-half of the land in controversy upon her death, and if you find that on the 21st day of January, 1901, the plaintiff Mrs. Mary Wilson, believing and thinking that the deed introduced in evidence of date January 21, 1901, conveyed the half of the land in controversy to B. B. Wilson, the title to same to pass to said B. B. Wilson only at her death, and so believing she, in ignorance of the fact that the deed passed the title to the half of the land at once to B. B. Wilson, you will find for plaintiff Mrs. Mary Wilson."

The ground of complaint is, that the deed of date January 21, 1901, is absolute on its face and was delivered to the grantor, named therein, and under such circumstances evidence to show that it was the understanding of the parties thereto that the deed should not take effect until after the death of the grantor, was inadmissible, and the issue should not have been submitted to the jury.

We are of opinion that under the allegations and facts disclosed by the record appellant's contention should not be sustained. It is true the deed on its face was absolute and sufficient to convey unconditionally the land in controversy and to vest in appellant the present title thereto. But appellee was ignorant and unable to read the deed, and did not know the contents thereof at the time of its execution and delivery. She had the utmost confidence in appellant, and believed



the deed contained the real terms of their contract and in all respects complied with their agreement. She was willing to convey her interest in the land to appellant, provided the deed did not become operative and the title pass until her death; and provided she remained in control of the property and appellant supported her. To this her mind assented, but not to the terms of the deed sought to be canceled.

It seems to be well established that it is essential to the validity of a deed that the mind of the vendor comprehends and assents to its terms; that if the vendor was unable to read and was misled as to its terms, he is entitled to a decree canceling the deed. *Perez v. Everett*, 73 Texas, 431; *Harding v. Blackshear*, 60 Texas, 132. The case of *McLendon v. Brockett*, 32 Texas Civ. App., 150, 7 Texas Ct. Rep., 288, is believed not to be in point. In that case it was an uncontroverted fact that the grantor executed the deed with full knowledge of its terms, and it was not alleged or attempted to be shown that fraud was practiced either in the preparation or execution of the deed or in obtaining the possession thereof. In the case at bar it is alleged and shown that the deed in question was prepared by or at the instance of appellant; that other and materially different terms than those agreed upon were engrafted on the contract, of which appellee had no knowledge and to which she did not assent. We conclude the issue was properly submitted to the jury, and that their verdict is sustained by the evidence.

Other assignments of error complaining of the charge of the court are believed to be without merit and will be overruled. Finding no reversible error in the record, in so far as raised by the assignments and propositions thereunder, the judgment of the court below is therefore affirmed.

*Affirmed.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v.  
JOHN FLOOD.

Decided March 12, 1904.

**1.—Contributory Negligence—Passenger Sitting by Window.**

A passenger injured by reason of a cinder from the engine entering his eye was not guilty of contributory negligence in sitting by an open car window through which the cinder entered the car.

**2.—Passenger—Waiver of Injury in Free Pass.**

A limitation of liability, in a railroad pass, signed by the recipient of the pass, whereby he assumes all risks of accident or damage to person or property, is void as against public policy.

**3.—Carrier of Passengers—Degree of Care—Charge.**

A charge requiring a railway company to use "proper care" in keeping in repair the appliances for preventing the escape of sparks from its passenger engines does not require too high a degree of care, and the term "proper care" does not require any definition in order to prevent the jury from understanding it as requiring care in too high a degree.

**4.—Personal Injury—Damages for Lost Time.**

The fact that at the time of his injury plaintiff was not actually engaged in any employment and was not earning anything will not preclude a recovery for the value of his time lost on account of the injury, as it will not be presumed that he would not have secured employment had he not been injured.

**5.—Contributory Negligence—Care in Attending to Wound—Charge.**

Where the main charge instructed the jury that if plaintiff failed to use ordinary care to avert and lessen his injuries, and that by reason thereof they were aggravated, he could not recover for such aggravation, a special charge instructing that if plaintiff did exercise ordinary care in attending to his wound, then defendant would be responsible for same, although the jury might believe that had he pursued some other course or adopted some other measures the injury would not have resulted so seriously,—merely gave in an affirmative manner plaintiff's contention on the issue, and was not on the weight of evidence in giving undue prominence to that matter.

**6.—Carrier of Passenger—Contributory Negligence—Passenger Sitting by Open Car Window.**

A requested charge, set out in the opinion, as to negligence on the part of a passenger in sitting by an open car window, held properly refused as on the weight of evidence, and one given held to fairly submit the issue, if it can be said in any case that such an act can constitute contributory negligence.

**7.—Personal Injury—Damages—Accident Policy as Lessening Recovery.**

In an action for personal injury evidence was not admissible on the issue of contributory negligence to show that the injured person carried an accident policy which had since been paid, as this could not have the effect of reducing the compensation, if any, to which he was entitled.

**8.—Evidence—Exclusion by Oral Instruction of Court.**

Plaintiff's counsel, in the examination of certain witnesses on the trial, exhibited to them a piece of old wire netting such as is used in spark-arresters of engines and sought to have them identify it as part of the spark-arrester of the engine in question, but they did not so identify it, and the court thereupon told the jury not to consider the piece of netting at all nor the testimony in reference to it, as it was excluded. No special charge in writing was requested in reference to the matter. Held, that the presumption obtains that the jury were not influenced by the evidence.

Appeal from the District Court of Collin. Tried below before Hon. J. M. Pearson.



*T. S. Miller, Perkins, Craddock & Wall, and Head & Dillard, for appellant.*

*Randell & Wood and Garnett & Smith, for appellee.*

BOOKHOUT, ASSOCIATE JUSTICE.—This action was brought to recover damages for personal injuries sustained by appellee while a passenger on the appellant's train from Fort Worth to Denison, caused by a spark or cinder getting into his eye. There was a judgment upon the verdict of a jury for appellee on April 11, 1903, for \$11,000. Defendant appealed. This is the second appeal in the cause, the first being reported in 70 S. W. Rep., 331.

*Conclusions of Fact.*—On the night of July 17, 1899, the appellee was a passenger on one of appellant's passenger trains on his way from Fort Worth to Denison. About 2 o'clock in the morning, and just after passing Pottsboro, a red-hot cinder escaped from the appellant's engine and struck the edge of the window sill and bounded into appellee's eye, and burned it so that he lost the sight thereof. Appellee at the time was riding in the car known as the smoking car, and sitting in the front seat on the south side thereof near an open window. There were two cars, the mail car and baggage car, between the car in which he was riding and the engine. The engine was not equipped with proper appliances to prevent the escape of sparks and cinders, and in this respect the appellant was guilty of negligence, and such negligence was the proximate cause of the appellee's injury. The injury resulted in the loss of the eye, and caused the remaining eye to become affected and the sight thereof has thereby been impaired. We find the appellee was not guilty of contributory negligence in riding in the smoking car and in front of an open window, or in failing to seek medical attention and in failing to have his injured eye properly treated, and that he has suffered damages as a result of his injuries in the amount of the verdict and judgment.

*Opinion.*—There was no error in refusing to admit in evidence the condition printed on the back of the pass upon which appellee was riding, reading: "Conditions: This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risks of accident and damage to person or property. It will be forfeited if presented by other than the undersigned. I accept the above conditions. John Flood." Whatever may be the holding on this question in other jurisdictions the law is settled in this State that these conditions can not be enforced. Such was our holding on the former appeal, and we know of no reason for changing our ruling in this respect. 70 S. W. Rep., 331.

In the fourth paragraph of the charge the court applied the law to the facts, and instructed the jury on the law relating to the issues which



they were required to find in order to **return a verdict** for plaintiff. No objection is made to this charge. In giving the reverse of the proposition embraced in said paragraph, the court instructed the jury that, "if you believe from the evidence that said engine was at the time in question equipped with the best approved apparatus and appliances then in the use for the prevention of the escape of sparks or cinders therefrom, and that the defendant had exercised proper care to keep said appliances and apparatus in reasonably good repair and condition as regards the escape of cinders, then you will find for the defendant, although you may further believe that a cinder was emitted from said engine and struck the plaintiff in the eye and injured him as alleged in the petition." This charge is complained of in that the degree of care on the part of defendant with respect to keeping the appliances and apparatus in repair is stated as "proper care," and the charge does not define proper care, and it imposed too high a degree of care upon appellant. The charge is not subject to the criticism made. The jury could not have understood that by proper care the charge meant a higher degree of care than the care due by a carrier to a passenger, and this had been correctly defined. The appellee being a passenger, the appellant owed him that high degree of care to keep its engine and appliances in repair which a very prudent and cautious person would use under similar circumstances. *St. Louis S. W. Ry. Co. v. Parks*, 1 Texas Law Journal, 499, 76 S. W. Rep., 740. The charge as a whole submitted this issue as favorably to appellant as it was entitled to.

The charge on the measure of damages authorized a recovery by plaintiff for the reasonable value of his services for the time lost by him on account of his injuries. It is insisted that this was error for the reason that at the time of his injury appellee was not actually engaged in any employment and not earning anything. The criticism is not sound. It is argued that because he was not earning anything when injured it must be presumed that he would not have secured employment and would not have earned anything, had he not been injured. The evidence does not authorize any such assumption. It is shown that since he was injured appellee has sought employment and had been able to earn a small amount, but not as locomotive engineer.

The court, in defining the duty of appellee to care for his injuries, instructed the jury as follows: "If you find for plaintiff, and if you further find and believe that after the cinder got in plaintiff's eye he failed to use such care and means to avert or lessen his injuries as an ordinarily prudent person, situated as plaintiff was, would have used under similar circumstances, and that by such failure, if any, his injuries were aggravated or increased, then if you so find you will not allow plaintiff anything on account of such aggravated or increased injuries." Thereafter, at the request of the appellee, the court gave the following special charge: "If you find from the evidence that after being so injured, if he was, the plaintiff exercised such care in attending to his wounds and in trying to care for same as an ordinarily pru-



dent person would have done under the same or similar circumstances, then you are instructed that the defendant company would be responsible for such injuries so sustained by the plaintiff, even though you may believe that if the plaintiff had pursued some other course or taken some other measure in and about his injuries they would not have resulted as seriously as the proof may show in this case they did result."

Appellant complains of the giving of the special charge on the ground that it gave undue prominence to this issue, and is upon the weight of evidence and calculated to impress upon the jury that in the opinion of the court the appellee had exercised ordinary care in the treatment of his injuries. The main charge instructs the jury that if they find that appellee failed to use ordinary care to avert and lessen his injuries, and that by reason of such failure his injuries were aggravated or increased, they could not find for him for such aggravation or increased injuries. The special charge goes further and tells them that if appellee did exercise ordinary care in attending to his wound and in trying to care for same, then defendant would be responsible for same, although they might believe that had he pursued some other course or taken some other measure in and about his injuries they would not have resulted so seriously. The special charge gave in an affirmative manner the appellee's contention on this issue, and was not on the weight of evidence.

Complaint is made of the action of the court in refusing appellant's special charge, reading: "If you believe from the evidence that the plaintiff got a cinder in his eye while he was riding in one of the defendant's cars at night, and that at the time he had his face near to and turned toward an open window, and that a person of ordinary care would not have remained in such situation under the circumstances that plaintiff did, and with the information he possessed as to the danger to which he was subjected from flying cinders, and that such situation proximately contributed toward causing plaintiff's injury, you will find for the defendant." The charge is upon the weight of evidence, and was properly refused. The court gave a charge submitting the issue of contributory negligence on the part of appellee in riding in the front part of the smoking car and near an open window, and instructed the jury that, "if in riding in the position and under the circumstances which you find and believe from the evidence he was riding, plaintiff was guilty of negligence, and such negligence, if any, proximately contributed to cause plaintiff's injury, to find for defendant. If it can be said in any case that a passenger can be guilty of contributory negligence in riding in a coach provided by the carrier for the carriage of passengers, then the charge of the court fairly submitted the issue.

The fact that the appellee, at the time of the injury, held a policy of accident insurance which was then in full force and which he has since collected, was not admissible in evidence, and the court did not err in so holding. This fact could not have the effect of reducing the



compensation to which the appellee was entitled for his injury, if the same was the result of negligence on the part of appellant and was not contributed to by his own negligence. Nor was the evidence admissible on the issue of contributory negligence of appellee. It was proven that the appellee had accident insurance and the amount thereof, and appellant sought to prove that he had collected the same, the contention being that the same was admissible on the issue of contributory negligence. We fail to appreciate upon what theory the evidence was admissible as tending to prove contributory negligence on the part of appellee.

Complaint is made that the court erred in permitting the plaintiff's counsel, on cross-examination of certain witnesses of defendant and on the direct examination of plaintiff, to exhibit to each of said witnesses in the presence of the jury a piece of old wire netting, similar to that used in spark-arresters of locomotives, without having identified the same as part of the spark-arresting appliances of engine No. 176, the one shown to have been pulling the train upon which plaintiff was riding when injured, because the same was immaterial and irrelevant and was not a proper matter to exhibit in the presence of the jury. The purpose of the examination of these witnesses seems to have been to identify this piece of netting as part of the same netting used in the spark-arrester of engine No. 176, at the time appellee was injured. The court announced to counsel that unless they could show the same was a part of the netting in the spark-arrester of said engine at the time of the accident to plaintiff, the testimony would not be admitted. After the witnesses had examined the same and failed to identify the netting as a part of that in use in the engine at said time, the court sustained the exception to the evidence and instructed the jury orally that they would "not consider the piece of netting at all, and that the piece of netting so exhibited, together with the testimony of the various witnesses that have been examined in reference to that piece of netting, is excluded from you and you will not consider it at all." The defendant made no request of the court to have the jury withdrawn while the plaintiff was seeking to have the witnesses identify the piece of netting as a part of the netting on the engine at the time of the injury, nor did the defendant request any special charge in writing in reference to the testimony, in addition to the oral instruction given at the time the court sustained the exception thereto and excluded the same from the consideration of the jury. The wire netting exhibited to the witnesses in the presence of the jury was not calculated to arouse the sympathies of the jury. These facts being shown, and the defendant having failed to request a special written charge instructing the jury to disregard the testimony, the presumption obtains that the jury were not influenced by the evidence. *Smith v. Caswell*, 67 Texas, 567.

The evidence was sufficient to justify the jury in finding that the defendant had failed in its duty to equip its engine with the best approved spark-arrester in general use to prevent the escape of fire, and



that such failure constituted negligence which proximately caused the injury to appellee, and that as a result of such injuries appellee has suffered damages in the amount of the verdict and judgment, and it follows that there was no error in the action of the court in overruling appellant's motion for new trial, based upon the alleged insufficiency of the evidence in these respects. These findings dispose of appellant's assignments of error numbers 11 and 12 adversely to appellant.

Finding no error in the record, the judgment is affirmed.

*Affirmed.*

Writ of error refused.



JOSEPHINE GIDLEY ET AL. V. I. LOVENBERG, ADMINISTRATOR, ET AL.

Decided March 15, 1904.

**1.—Will—Conveyance in Writing.**

Article 624, Revised Statutes, providing that a conveyance of interest in land from one person to another shall be in writing duly subscribed, applies to deeds and not to wills.

**2.—Description in Will—Intention of Testator.**

It is not held that a bequest may not be void because of a defective description of the thing intended to be conveyed, but where such thing is identified by sufficient description the intention of the testator will be carried out if it can be gathered from the entire instrument, and the broadest liberality in construction is allowed in ascertaining such intention.

**3.—Devise—Building—Houses—Rents Include Property.**

The terms "building" or "houses" include the real estate on which they are situated unless the general meaning of the terms is modified by the language of the context, and an absolute devise of the entire rents of a named property will carry the property also.

**4.—Will—Construction.**

See will construed as passing title to lots and improvements and not merely to rent from the same.

**5.—Will—Charitable Devise—Intention**

Where a will provided for the establishment, by the executors, of a charitable institution, after the death of certain devisees, from rents which were to go to such devisees during their life time, the fact that the devisees outlived the executors and the institution was never established by the executors named in the will for such purpose can not defeat the general purpose of the testator in the establishment of the charity.

**6.—Will—Charitable Devise—Designation of Beneficiaries.**

A will establishing a "widows and orphans home, \* \* \* contributing as far as possible toward ameliorating the condition and comforting the unfortunate of that class," held not subject to the objection that the class named as beneficiaries is too indefinite and includes all widows and orphans regardless of whether they are in need of charity, where the intention of the testator was that such home should be for the care of the poor and needy.

**7.—Charitable Devise—Trustees—Beneficiary.**

A devise of the estate in remainder after the death of devisees for life, for the establishment of a widows and orphans home to be created and incorporated by the trustees for the relief of persons of that class in a certain city, held not void for want of a trustee or beneficiary capable of taking title; the title was in the trustees till the creation of and transfer to the contemplated corporation by them.

Appeal from the District Court of Galveston. Tried below before Hon. Robt. G. Street.

*Kleberg & Neethe, Mart H. Royston, and Moritz O. Kopperl, for appellant.*

*R. V. Davidson, Eugene A. Hawkins, and I. Lovenberg, Jr., for appellee.*

GILL, ASSOCIATE JUSTICE.—On March 2, 1862, Rosanna Osterman, a resident of Galveston County, Texas, made a will which in March, 1866, after her death in that year, was duly probated. By clause 2 of her will her brothers Leon and Isadore Dyer and Franklin H. Merri-man were named as independent executors without bond and the "de-



tainers" of her entire estate until the will was fully executed. Clauses 8 and 13 of the will, which are the only parts thereof involved in this litigation, are respectively as follows:

"Item 8. I will and bequeath (in accordance with my late beloved husband's oft-repeated wish) to my loved sister, Hannah, now Mrs. Hannah D. Symonds, wife of Benjamin W. Symonds, residing in the city of Cincinnati, State of Ohio, in her own name, right and title, all the rent of my two brick buildings, situated in the city of Galveston, State of Texas, on lots six and seven (6 and 7), in block six hundred and twenty-two (622), providing the rent does not exceed the sum of four thousand dollars (\$4000) per annum, all rent exceeding that amount to be appropriated for the use and benefit of my dear niece, Isabella Dyer, now residing in the city of Galveston, State of Texas, daughter of the late Joseph Dyer, of New Orleans, La., and my dear, faithful friend, Mary Ann Brown, also resident of Galveston city, State of Texas, unless the said Hannah D. Symonds have children, then, and in that case, she is to inherit the entire above named buildings, and her children become the legal heirs of said property after my loved sister Hannah's demise. In the event of said Hannah D. Symond's death, without children, before said Isabella Dyer's and Mary Ann Brown's demise, then and in that case it is my wish (providing said buildings are not destroyed by fire or otherwise) that the rent accruing from said buildings (after paying taxes and all necessary repairs) be equally divided between my niece, Isabella Dyer of Galveston, State of Texas, and my trustworthy friend, Mary Ann Brown, also of Galveston city, State of Texas, during their life, at the death of either, half (or, if both, the entire income) to be safely invested by my executors to create a fund, so that at the death of the owner, or both, the amount already accumulated from the rent, and all the revenue from said property, to be applied for the founding and defraying of expenses for a 'widows and orphans home' to be established with a view of contributing, as far as possible, toward ameliorating the condition and comforting the unfortunate of that class in the city of Galveston, State of Texas. It is my desire that after my executors shall have legally organized and established said contemplated 'widows and orphans home' and appointed proper persons to administer and control the direction of its affairs, then such persons so legally appointed, and their successors in office, conjointly with the mayor of the city of Galveston and his successors in office, shall have the perpetual direction and control thereof—the said 'widows and orphans home' to be organized according to law, as a charitable institution for the support of widows and orphans of whatever denomination. For are not all men brothers before God?"

"Item 13. I will and bequeath to my namesake, Rosanna Osterman Maas, daughter of Sam and Isabella Maas, of the city of Galveston, State of Texas, the life interest of fifty shares (50) Galveston city



wharf stock. At and after her death the dividends to be appropriated for the support of indigent (if any there be, if not to any other denominations) Israelites residing in Galveston."

Mrs. Hannah D. Symonds died without issue in 1897. Mary Ann Brown died in 1893 and Mrs. Kopperl died in 1902. The three executors died some time prior to 1888 without organizing or establishing a widows and orphans home and without having undertaken in any way to carry out that feature of the will.

Item 68 of the will is as follows: "And as regards the rest and residue of my estate after all the above legacies and bequests are paid, I appoint and institute my beloved brothers Leon and Isadore Dyer and Benjamin W. Symonds my universal legatees of the rest and residue of my estate movable and immovable."

Leon Dyer and Benjamin W. Symonds (now both dead) conveyed to Isadore Dyer all their interest in the Rosanna Osterman estate. Isadore Dyer, who died in 1888, left a will which contained the following clause:

"In the event the charity contained in item 8 of the last will and testament of Rosanna Osterman, deceased, for the endowment of a 'widows and orphans home' is not established or held by the court to be illegal or inoperative, then as residuary devisee of the said property—Hannah D. Symonds, Isabella Kopperl and Mary Ann Brown being legatees for life in the rents and profits, being demised—then, in and after that event, it is my wish, and I so will, that lots Nos. six and seven (6 and 7), in block No. six hundred and twenty-two (622), in the city of Galveston, with improvements thereon, together with rents, revenues and incomes therefrom, after paying taxes and all other necessary expenses, be applied and set aside for the founding of a 'widows and orphans home' in the city of Galveston; that at least three of the following named gentlemen procure, at the expense of my estate, in their names as trustees, a charter of incorporation under the laws of Texas, to exist for fifty years, and for purposes of benevolence and charity in the city of Galveston, to be named 'The Osterman Widows and Orphans Home Fund;' and I hereby appoint the following gentlemen as said trustees: Bertrand Adoue, Julius Rosenfield, Henry M. Trueheart, W. L. Moody and Leopold Fellman. When said corporation shall have been fully and legally organized in said city, then I direct that my said hereinafter named executors shall convey and turn over said lots Nos. 6 and 7, in block 622, together with the improvements thereon, in the city of Galveston, together with accrued interest, rents and revenues, as well as incomes, to said corporation and its successors as a perpetual fund, the rents, incomes, earnings and products of which to be used for the relief and support of bona fide, permanent residents, worthy widows and orphans of said city, of all religious denominations, who may from time to time permanently reside and live in said city, in the hope that the benevolent and charitably



disposed portion of my fellow citizens will from time to time contribute to the foregoing donation, to the end that all said worthy, destitute widows and orphans in our midst, unable to support themselves, will have their several necessities supplied, to the extent, at least, of relieving their sufferings. And said corporation, by its trustees and other proper officers, use and disburse the net revenues, rents and incomes derived from said named property for the purposes and objects of its organization; and the said trustees shall have the undisputable and uncontrollable power and authority to name, designate and select their successors in office to fill their places as trustees, and they and their successors to select, from time to time, such changes as they may think advisable and proper for such widows and orphans residents of this city as they may deem needy and worthy of this charity, and such widows and orphans so selected and designated, from time to time, and for and during such time as they may be so receiving such charity, shall be held, considered and construed by all persons in all places as the persons entitled to said benefits of this charity for the time being as if their name were respectively set forth in this will as subjects thereof, regardless of their religious belief. At the end of said fifty years, it is my earnest wish and desire that said charter be renewed, or reobtained or regranted in some way, from some lawful power, for the above like purposes and objects, to the end, in some way, that said lots Nos. 6 and 7, in block No. 622, with the improvements thereon, be continued as a charity, and the revenues be appropriated and used for the above class of persons; my will being and I so direct that said trust shall never cease, abate, diminish, end or be destroyed for want of trustees or persons or powers to administer and carry out the same in its full purposes and objects. Until said corporation is legally formed, my executors and legal representatives shall hold said named property and accrued funds, until said corporation is legally formed, in trust for same."

Joseph Osterman Dyer, Isadore Lovenberg and J. P. Alvey were appointed independent executors of the will of Isadore Dyer, and in pursuance of his will, obtained a charter incorporating the Osterman "Widows and Orphans Home Fund" as a benevolent and charitable undertaking and the corporation was thereafter duly organized.

On November 21, 1888, I. Lovenberg was appointed administrator de bonis non with will annexed of the estate of Rosanna Osterman. Miss Rosanna Osterman Maas, mentioned in clause 13 of the will of Mrs. Osterman, is still living and is now Mrs. Redlich. Josephine Gidley is a niece of Mrs. Rosanna Osterman and one of her heirs at law. Moritz and Herman Kopperl are sons of Mrs. Kopperl, who was also a niece of Mrs. Osterman and sister of Josephine Gidley. The buildings on lots 6 and 7 mentioned in clause 8 of the will have never been destroyed and are still intact.

The administrator, I. Lovenberg, brought this suit in the District



Court of Galveston County, making Josephine Gidley, Herman and Moritz Kopperl and others interested in the estate parties defendants, the purpose of the suit being to have the court construe the will and especially the clauses set out above, and instruct him what share of the estate, if any, each of the above named defendants would be entitled to. There was a further prayer that the court would adjudicate the trusts declared in clauses 8 and 13 of the will and if they should be held valid, appoint trustees therefor.

Josephine Gidley and Herman and Moritz Kopperl answered that clauses 8 and 13 created no more than a life estate in the life tenants designated and were insufficient to convey the title out of the estate, wherefore it descended to the heirs according to the laws of descent and distribution. On a trial without a jury the court adjudged the charitable devise expressed in clause 8 to be valid and vested the title of the property in the Osterman Widows and Orphans Home Fund (the corporation mentioned above) for the purposes and uses expressed in the will. The court further held that the property mentioned in clause 13 should pass after the death of Mrs. Redlich to the Hebrew Benevolent Society of Galveston, that being a corporate institution organized for the benefit of indigent Israelites in Galveston. Josephine Gidley and the defendants Kopperl have appealed and under appropriate assignments of error present for our determination the question hereinafter discussed.

Appellants contend that the charitable devise undertaken in clause 8 must fail and the property descend to the heirs: (1) Because the lots themselves are not devised, but only the rents of the houses thereon, and that not absolutely because of the provision in item 9 of the will which provides that if the houses on the lots mentioned are in any manner destroyed so as not to yield any rental the executors are to invest the proceeds of other property so as to produce an income of \$6000, of which \$4000 is to be paid to Mrs. Symonds and \$1000 each to Isabella Dyer (Kopperl) and Mary Ann Brown during their lives. (2) That clause 8 of the will created only a contingent remainder for the charity mentioned dependent on the organization by the executors themselves of the widows and orphans home, and as this was not done the bequest fails. (3) It is void because the devise is made neither to a trustee certain nor for the use of a beneficiary certain, nor to any corporation or legal entity having capacity to take. (4) Because with respect to the proposed beneficiaries it is too vague and uncertain to be capable of execution.

In disposing of the first objection it should be borne in mind that if Mrs. Symonds should leave a child or children, the bequest of lots 5 and 6 to her and her heirs is absolute, thus leaving no provision for the charity in question.

The provision that the rents of the houses thereon shall go to Mrs. Symonds, Isabella Dyer and Miss Brown in the proportions named, is



modified in clause 8 by the proviso against destruction of the houses so that the property shall yield no revenue, but is supplemented by clause 9, which makes other provision for the life bequests to the three devisees named, not only by providing that other funds shall supply the life bequests in case the houses are destroyed, but also provides against deterioration in their rental value so that in any event \$4000 per annum shall go to Mrs. Symonds and \$1000 each to Isabella Dyer and Miss Brown during their lives.

These special provisions do not, however, affect the bequest to the unfortunate widows and orphans of Galveston, for in any event the entire rent of the houses goes to the charity named after the death of the three legatees thus provided for for life.

Note the provision that if the property shall fail to provide sufficient revenue to yield \$6000 per annum it shall be supplemented from other sources for the benefit of the life legatees. If the houses be destroyed so that the property yield no revenue the life legatees are to be provided for entirely from other sources.

The charitable bequest is to be supplemented from no source, but after the death of the life legatees the entire income, however much or little the amount, is bequeathed to the charity named. It is thus seen that the provision concerning the possible destruction of the houses does not apply to the charitable bequest.

It was the manifest purpose of the testatrix that the life legatees should receive a certain sum per annum in any event. It is equally plain that the bequest to the charity should not exceed the income of the property set aside for that purpose. That the testatrix intended in case Mrs. Symonds died childless that the property after the death of the other life legatees should constitute a perpetual fund for the uses named appears to us reasonably clear.

But it is contended that a conveyance of all the rents of certain buildings forever does not convey the real estate on which the buildings rest. It is conceded that the general rule is otherwise, but it is urged that under our statutes controlling the conveyance of real estate such language is insufficient.

Article 624 of the statute relied on provides that no estate of inheritance or freehold in lands and tenements shall be conveyed from one to another unless the conveyance be in writing duly subscribed and delivered by the party disposing of same. Article 628 prescribes the form of a deed of conveyance.

We can not perceive the force of the contention. In the first place the provisions of the statute apply to deeds, and in construing them the legal effect of the language used is the question.

While real estate may be devised only by a written will it is nevertheless true that in the construction of a will the broadest liberality is allowed in ascertaining the intention of the testator, which when ascertained will be given effect without regard to the form of expression.



We do not mean to hold that a bequest may not be void because of a defective description of the thing undertaken to be devised, but merely that if the thing be identified by sufficient description, what the testatrix intended should be done with it will be given effect if that intention can be gathered from the entire instrument.

That the term "buildings" or "houses" include the real estate on which they are situate unless the general meaning of the terms is modified by the language of the context has been decided. *Cassiano v. Ursuline Academy*, 64 Texas, 675.

That an absolute devise of the entire rents of a named property will carry the property also seems to be well settled, and the reason of the rule is obvious. Such a use necessarily includes the corpus. 2 *Jarman on Wills*, 609; 18 *Am. and Eng. Enc. of Law*, 711.

We conclude, therefore, that the provision of the will under discussion had the effect to devise to the named charity the lots and improvements in question and should be given effect unless some one or more of the other objections urged is tenable.

Under the second objection stated above it is contended that the devise is void because the will created a mere contingent remainder dependent upon a condition which has never happened, viz., the organization by the executors of the Osterman Widows and Orphans Home; that the executors died without organizing it and the condition can therefore never happen. This involves the contention that the general purpose of the testatrix in this respect was subservient to her expressed desire that her executors should organize it and appoint its management. It involves a holding that the executors were clothed with discretion to organize it or not as they chose and empowered them to defeat by mere inaction the earnestly expressed desire of the testatrix.

It seems to us this is not only a strained construction of the will but does violence not only to the spirit but the letter of the instrument. We find no language in the will which would justify us in subordinating the purpose to be accomplished to the means provided for its accomplishment.

The testatrix must have known that the life legatees might outlive the executors, an event which actually occurred. To organize the institution before a fund was available for its maintenance would have been an act of folly. Besides, it is plain from this and other provisions of the will that the widows and orphans home was not to be organized until the death of the life legatees. This appears from provisions of item 8 of the will regarding the investment of portions of the rents until the death of the last life legatee under that item.

This brings us to a consideration of the last objection upon which appellants especially rely.

We take up first the contention that the class named as beneficiaries is too indefinite. The language used in designating the class is "for a widows and orphans home to be established with a view of contribut-



ing as far as possible toward ameliorating the condition and comforting the unfortunate of that class in the city of Galveston, State of Texas." It seems to us the objections of appellant are hypercritical. For instance, it is suggested that the terms used would include wealthy widows and orphans if crippled or in ill health or if unfortunate in any of the numberless forms in which misfortune comes to humanity. That it would include any person under the age of twenty-one years who had lost one or both parents, and this without reference to their condition in life.

If it were right for the court to approach in a spirit of criticism and with a view to break down and destroy a will which is pervaded from beginning to end with broad and delicate charity these criticisms might be upheld. But such bequests as the one in question are favored by courts of equity and will be upheld if from the four corners of the will a purpose can be gathered to establish a trust for a class sufficiently definite to be legally ascertained. *English v. Sailors' Snug Harbor*, 3 Pet., 99.

A home is to be established. Why should we read into the will that it is for others than the homeless? Money is set aside for comforting the unfortunate. Why should we read into the will a purpose to apply it to the use of others than those who lack these comforts which money may buy? That the testatrix had no such purpose is plain. That the word "unfortunate" is used in the sense of "poor" or "indigent" is equally plain. A devise for the indigent widows and orphans of Galveston is unquestionably good. By thus designating a class the creation of a perpetuity is permissible. Had individuals been named the bequest in perpetuity would have been void. This conclusion answers also the objection that the bequest is void for want of a trustee or beneficiary capable of taking. But it seems to us there is another answer to that objection.

The executors were made the "detainers" of the estate until the provisions of the will were carried into effect. This would have kept them in office until the death of the life legatees had they lived so long, and it seems to us that the legal title to this trust property was in them as trustees until such time as the home might be organized under the provisions of the will, when it became their duty to transfer it to the corporation thus organized. The devise was not to the corporation, but the organization of the latter was provided for as a means of carrying out the purposes of the trust.

The executors being clothed with no such discretion as would enable them to defeat the trust by refusing to exercise it, the court will not allow it to fail for want of trustees.

"Whenever the only objection to a bequest is that it is for the persons described collectively by some characteristic trait by which they may be identified if the bequest is a charity within the statute and therefore valid, it is as good and available as it would have been at



common law had it been to one competent person in trust for another identified by the will."

The above quotation is from *Moore v. Moore*, 4 Dana, 354, and is cited by Justice Moore in *Paschal v. Acklin*, 27 Texas, 202. The case last cited and *Bell County v. Alexander*, 22 Texas, 350, are authority for our conclusion that the sufficient designation of the class will alone uphold the trust. We cite further upon the point, *Perry on Trusts*, sec. 315; *English v. Sailors' Snug Harbor*, supra; *Russell v. Allen*, 107 U. S., 167; *Hopkins v. Upshur*, 20 Texas, 89; *Vidal v. Howard's Executors*, 2 How., 127; *Jones v. Habersham*, 107 U. S., 191.

In *Nolte v. Meyer*, 79 Texas, 351, a devise to the German citizens of a certain neighborhood, without defining the limits of the neighborhood, was held too indefinite to enable the court to ascertain the class to be benefited. We have no such difficulty here. The other authorities cited by appellant on this point are equally inapplicable, except the case of *Heiss v. Murphy*, 40 Wis., 276, which is so against the weight of authority we must refuse to follow it.

Under the eighth assignment of error the action of the court is assailed in upholding the charitable bequest in the thirteenth clause of the will and in vesting the forty shares of stock in the corporation known as the Hebrew Benevolent Society of Galveston upon the death of Mrs. Redlich, because the class named as beneficiaries is too uncertain and because no trustee was appointed by the testatrix to carry out the trust. These objections have necessarily been disposed of in what has been said in disposing of the objection to the eighth clause of the will. We therefore overrule the assignment.

Upon the first question discussed in this opinion we have some doubt. Upon the sufficiency of the bequest in other respects we are clear. The conclusion we have reached renders it unnecessary for us to pass upon the contention of appellee that if the trusts in question should for any reason be held invalid the property passed to the residuary legatees though we are inclined to think the proposition tenable. We have not deemed it necessary to add anything to the mass which has been written upon the question, but have contented ourselves with a statement of the established rule, an application of it to the facts of this case, and a citation of leading authorities in its support. As the case stands the appellants have no interest and are in no position to complain of the method adopted by the trial court for carrying out the purposes of the testatrix as expressed in the will. We are of opinion the judgment should be affirmed and it is so ordered.

*Affirmed.*

Writ of error refused.



## H. M. BEAUCHAMP V. H. N. RUNNELS.

Decided March 15, 1904.

**Lease—Tenancy at Will of Lessor.**

A lease of property giving the lessees permission to improve the premises as they desire and providing that "this lease is to continue for such time as the said Wilson & Runnels or either of them may desire to use the same," is construed as creating a tenancy at the will of the lessees and is therefore at the will of the lessor.

Appeal from the District Court of Shelby. Tried below before Hon. Tom. C. Davis.

*Bryarly & McKnight*, for appellant.

*D. M. Short & Sons* and *Wheeler & Sanders*, for appellee.

GARRETT, CHIEF JUSTICE.—Appellant's wife while a feme sole leased to W. P. Wilson and H. N. Runnels, a mercantile firm doing business in the town of Center under the firm name of Wilson & Runnels, 60x170 feet of ground adjoining the brick storehouse in which the said Wilson & Runnels were then doing business. The lease was in writing dated November 4, 1901, and expressed a consideration of one dollar paid "and also many other considerations passing from said Wilson & Runnels in many ways by their assistance in the management of my business and home affairs." It recited the presence on said lot of a wooden house built by said Wilson & Runnels and granted them permission to place upon said grounds "such improvements as they may deem proper for their own use and benefit, and at any time they may deem proper they may remove such improvements that they may hereafter make or have heretofore made off of the same." The following is the provision as to term: "This lease is to continue for such time as the said Wilson & Runnels or either of them may desire to use the same, and are not to be interfered with by me, my heirs or assigns without their consent; and they shall have full power to place upon said grounds any and all fences, houses, gates or other improvements, or other property, and to use the same as they so desire." No improvements were put upon the property after the execution of the lease. The firm of Wilson & Runnels was dissolved and Wilson assigned his interest in the lease to Runnels. The lessor was afterwards married to the plaintiff and the lot is her separate property. In her behalf the plaintiff demanded possession in writing on March 26, 1903, and the next day brought this suit of forcible entry and detainer. There was judgment in favor of the plaintiff in the justice court and on appeal by the defendant to the district court judgment was rendered in favor of the defendant. The rental value of the property pending appeal was \$10 a month and the reasonable expenses in prosecuting the case an attorney fee of \$30.



In action of forcible entry and detainer the right of possession is the only issue to be tried. *Land Co. v. Turman*, 53 Texas, 622; *Hoffman v. Blume*, 64 Texas, 336. But it is the duty of the court to determine in case of holding over under a lease whether the lease has terminated, and for that purpose it will be necessary to hear evidence thereof and to construe the lease in order to determine the right of possession. The lease in this case recites the nominal consideration of one dollar and past services voluntarily rendered in neighborly offices to the lessor for which she leased the lot to the firm of Wilson & Runnels as long as they or either of them should desire to occupy it, with privilege of moving off the warehouse already built thereon by them and any improvements thereafter made. Gathering the meaning of the writing from the entire instrument in the light of the circumstances it can be construed as creating only a tenancy at the will of the lessees (*Amick v. Bribaker*, 14 S. W. Rep., 627; *Lee v. Hernandez*, 10 Texas, 137; *Sarsfield v. Healy*, 50 Barb., 245; *Gardner v. Hazleton*, 121 Mass., 494); and being at the will of the lessees it was also at the will of the lessor. *Guffey Pet. Co. v. Oliver*, 3 Texas Law Journal, 18, 9 Texas Ct. Rep., 426. The statute does not prescribe any length of time for the demand in writing for the possession before the lessor shall be entitled to possession, and demand made on the day before the complaint was filed was sufficient. The judgment of the court below will be reversed and judgment will be here rendered in favor of the plaintiff for the possession of the premises and damages. This judgment will be without prejudice to the right of the defendant to remove his improvements as stipulated in the lease.

*Reversed and rendered.*



THE STATE OF TEXAS V. FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND.

Decided March 16, 1904.

**1.—Taxation—Personal Property of Nonresident.**

The State has power to tax all personal property within its jurisdiction though the owner resides beyond the State.

**2.—Same—Situs of Property—Municipal Bonds.**

Municipal bonds and securities, though issued by a city in and owned by a citizen of another State, assume a concrete form beyond that of mere evidence of debt, which gives them a tangible situs and renders them subject to taxation in Texas when brought here by the owner and employed in his business within the State.

**3.—Foreign Corporation—Deposit of Bonds.**

Bonds of the city of Baltimore owned by a Maryland surety company and deposited by it with the State Treasurer of Texas, in accordance with section 2 of the Act of June 10, 1897, for the purpose of enabling such company to do business in this State, were liable to rendition and taxation for State and county purposes in the county of Travis, in which they were so held by the Treasurer.

**4.—Same—Treasurer—Rendition for Taxes.**

Municipal bonds owned by a Maryland corporation and deposited by it with the State Treasurer of Texas, in Travis County, for the purpose of obtaining a permit to do business in the State were the personal estate of a moneyed corporation within the meaning of article 5063, Revised Statutes, and were properly taxable there under the laws of the State.

**5.—Same—Rendition—Bailee—Assessor.**

The State Treasurer, as bailee of bonds deposited with him by a corporation of another State in order to obtain permission to do business in Texas was such an agent or trustee as was authorized by the statute to render the same for taxation; and if not, the adoption of his rendition by the county officer was sufficient, it being his duty to list unrendered property.

Appeal from the District Court of Travis. Tried below before Hon. R. L. Penn.

*James & Yeiser*, for appellant.

*Brooks & Shelley and Fiset, Miller & McClendon*, for appellee.

FISHER, CHIEF JUSTICE.—This is a suit by the State against the appellee to recover taxes amounting to \$1626.26, with interest thereon and penalties alleged to be due by the appellee upon securities of the value of \$50,000, which were on deposit with the Treasurer of the State on the first days of January, 1898, 1899, 1900 and 1901, which were so deposited by the Fidelity and Deposit Company under a law passed by the Twenty-fifth Legislature, approved June 10, 1897, requiring foreign corporations engaged in the surety and guaranty business in this State to deposit with the State Treasurer, in order to be permitted to transact business here, good securities of the cash market value of \$50,000. The sum sued for is the taxes due on this deposit for the years 1898, 1899, 1900 and 1901.

The answer of the defendant includes a general demurrer and a special demurrer to the effect that as the appellee appears to be a corporation,



created by the laws of Maryland and there domiciled, the State for the purposes of taxation did not have jurisdiction over the property in question, because of its intangible nature, and because a recovery of taxes upon this property would be in violation of the fourteenth amendment of the Constitution of the United States and would deprive the defendant of its property without due process of law; and an answer to the effect that the securities in question were merely deposited here by the appellee in order to enable it to do business within this State, and for no other purpose, and that it had to no managing agent in this State having control of its securities, and that the interest coupons attached to the securities were transmitted to and collected from the home office in the State of Maryland, and that the securities were at all times assessed for taxation in the State of Maryland, and were there paid by the city of Baltimore under a statute of that State requiring the city to pay taxes on this property, and that the defendant has, for each of the years mentioned in the plaintiff's petition, paid all the taxes required by the State of Texas, such as its franchise tax and the tax on its gross earnings.

The trial court overruled all the demurrers and rendered judgment to the effect that the State take nothing by its suit.

The facts agreed upon are as follows:

"1. That the defendant herein is a corporation duly incorporated under the laws of the State of Maryland, and was doing business on the 1st day of January, 1898, and has continued to do business since said date in the State of Texas up to the present time, under a regular permit to do business in this State, issued in full compliance with the laws of this State; and it has no managing agent or general agency of any character within the State having any control over the securities hereinafter mentioned, and that the coupons representing interest on the securities hereinafter mentioned are at maturity transmitted to and collected from the home office.

"2. It is agreed that the securities, the taxes upon which are sued for in this cause, were deposited with the Treasurer of the State of Texas, prior to the 1st day of January, 1898, under and by virtue of the provisions of chapter 155, acts Twenty-fifth Legislature, page 244, and were on deposit with said State Treasurer under and by virtue of the requirements of said law, and not otherwise, on the 1st day of January, 1898, and on the 1st day of January, 1899, the 1st day of January, 1900, and the 1st day of January, 1901, and that said deposit of said securities was made with the State Treasurer in compliance with the said law of the State of Texas for the purpose of enabling the said defendant to do business in this State, and for no other purpose, and that the cash market value of said securities was, as assessed on the 1st day of January of each of said years, the sum of \$50,000.

"3. That on the 1st day of January, 1898, 1899, 1900 and 1901, the said defendant had on deposit with the Treasurer of the State of Texas, in compliance with the laws of the State of Texas as aforesaid, the fol-



lowing securities or evidence of indebtedness described in plaintiff's petition, to wit, \$50,000 of certificates of stock of the city of Baltimore of the cash market value on the 1st day of January of each of said years of \$50,000.

"4. That if the said defendant is liable for taxes at all, to the State of Texas and county of Travis on the foregoing property, the taxes on the aforesaid property for the year 1898 due to the State of Texas and county of Travis amounts to \$415; and for the year 1899, \$415; and for the year 1900, \$398.33; and for the year 1901, \$398.33; that demand has been made upon said defendant for payment of said taxes prior to the ordering and institution of this suit, and that the defendant has refused to pay same or any part thereof; that on the 30th day of January, 1902, J. E. Kaufman, tax collector of Travis County, Texas, did assess the aforesaid property for each of the aforesaid years for taxes, upon the statement given him by John W. Robbins, State Treasurer, of the amount of same for each year, being the respective amounts set out in the foregoing paragraph, and did place the aforesaid assessments for each of the aforesaid years upon his tax collector's supplemental assessment roll, which was, by the Commissioners Court of Travis County, Texas, in open court duly approved on the 30th day of January, 1902; that the defendant was duly notified of said assessment by the said J. E. Kaufman, tax collector of Travis County, Texas, on the 31st day of January, 1902, and demand was by him then made upon defendant for the payment of the taxes so assessed, and payment was refused, and suit was thereupon ordered by the Commissioners Court of Travis County, Texas.

"5. That the aforesaid securities so assessed for taxes, and so claimed to be liable for taxes by the State of Texas and county of Travis for the foregoing years were never rendered for taxation for any of said years by said defendant in any other county of the State of Texas, and no other taxes on same have ever been paid in any county in the State of Texas, and that said property was subject to and rendered for taxation by defendant company under the laws of the domicile of said corporation, and was for each of said years then and there assessed for taxation, and that the taxes so assessed were then paid to the proper officials in the State of Maryland by the city of Baltimore under a statute of the State of Maryland requiring the city of Baltimore to pay taxes on all stock issued by it. That defendant has for each of the years above mentioned paid its franchise taxes and annual tax on gross earnings to the State of Texas, as the law requires."

*Opinion.*—The questions to be determined are: First, is the situs of the property in question within this State, so as to authorize the State to exercise its jurisdiction to tax it? Second, do the laws of this State relating to the taxation of property include property of the class in controversy; and has the law been complied with in rendering and assessing the property for taxes?



The State has the undoubted authority to tax all property, real and personal, within its jurisdiction. *McCulloch v. Maryland*, 4 Wheat., 316; *Tappan v. Mer. Nat. Bank*, 86 U. S., 490; *Coe v. Errol*, 116 U. S., 517; *Pullman Car Co. v. Pennsylvania*, 141 U. S., 18; *Savings and Loan Assn. v. Multnomah County*, 169 U. S., 426; *New Orleans v. Stempel*, 175 U. S., 309; *Bristol v. Washington County*, 177 U. S., 144; *Blackstone v. Miller*, 188 U. S., 202; *Piano and Organ Co. v. City of Dallas*, 2 Texas Ct. Rep., 262; and *Western Assurance Co. v. Halliday*, a recent case decided by the United States Circuit Court of Appeals of the Sixth District, on November 3, 1903. And this power may be exercised over the property within the State, although the domicile and residence of the owner may be elsewhere. Cases *supra*.

The question arises, were the securities at the time they were assessed for taxes within this State in the sense that it had jurisdiction over them for the purposes of taxation? The legal fiction that personal property attaches to the person of the owner, and is subject only to the jurisdiction of the laws of his domicile is not obsolete and without force, but has been by recent and well considered cases much modified, not only as to the classes of property that come within the spirit of the rule, but has extended a denial of an application of the doctrine where property is situated within a jurisdiction other than that of the owner, which former jurisdiction by the exercise of its laws assumes jurisdiction over it for the purposes of taxation, in order that it may bear its proportion of the burdens of the government of its actual situs that affords it protection. And this power may be exercised over the property of the nonresident that is in a sense intangible, which by its character in a concrete form is capable of having a value and an actual physical situs where permanently found, and in cases where its situs in the jurisdiction different from the domicile of the owner is for a business use and purpose. These cases rest upon the reason that the owner having voluntarily, by his conduct, fixed the situs of his property in another jurisdiction, which by its laws affords protection to it, must bear its equal proportion of the burdens of the government of its actual situs. Of course this rule does not establish the situs of such property different from that of the domicile of the owner, where it is merely temporarily in another jurisdiction, not there associated with a business use, or where it is merely in transitu.

In *Redmond v. Rutherford Commissioners*, 87 N. C., 122, the Supreme Court of that State in determining the situs of property somewhat of the character of that involved in this suit, uses this language: "The theory of taxation is that the right to tax is derived from the protection afforded to the subject upon which it is imposed. The debts due to the plaintiffs upon their land contracts are personal estate, the same as if they were due upon notes or bonds, and, so far as they have any substantial existence, they are in this State and not elsewhere. Their validity and protection and the remedies for their enforcement all depend upon the laws of this State, and in neither respect, nor in any other that we can think of, do they take any benefit from the laws of the plaintiff's domi-



cile. It is but just, therefore, that they should contribute towards the support of the only government which affords them protection, and help to defray the expenses incurred in so doing."

The Supreme Court of the United States in the case of *Bristol v. Washington County*, supra, in a case involving the liability of the owner for taxes due upon property of the nature involved in this suit, situated in a State different from his domicile, says:

"Persons are not permitted to avail themselves, for their own benefit, of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design."

The case of *Buck v. Miller*, by the Supreme Court of Indiana, reported in 37 Law. Rep. Ann., 389, and *Hubbard v. Brush*, 61 Ohio St., 252, and *Western Assurance Co. v. Halliday*, and many other cases that might be cited, announce the same doctrine.

The facts as agreed upon do not advise us of the nature of the securities in question, upon which the tax is sought to be imposed. The appellee in its brief, on page 11, uses the expression that the securities in question would naturally be included in the expression "bonds and other evidences of debt," here referring to a provision of the tax laws of this State; but from the manner in which they are treated by the parties in their briefs, we may assume that they are either bonds or municipal securities of some form, executed by the city of Baltimore, and for the payment of which it is liable.

Municipal bonds and securities, when properly executed, assume a concrete form, which gives to them a tangible status. They are more than merely evidences of debt. They may be stolen or converted and the wrongdoer held responsible for their value. *Toms v. Morse*, 80 Texas, 291. It is admitted that these bonds or securities, whatever they may be termed, have a fixed value of \$50,000; and it must be assumed that they are worth that much in the market, and can be sold for that sum. They constitute property within the meaning of the law, and their concrete form and fixed value as municipal securities give them a tangible existence. This doctrine is recognized in the case of *State Tax on Foreign Held Bonds*, 15 Wall., 300, one of the leading cases relied upon by appellee, which case, however, on denying the situs of personal property being different from that of its owner, has been qualified by the recent decision of *Savings and Loan Assn. v. Multnomah County*, 169 U. S., 421, and *New Orleans v. Stempel*, 175 U. S., 309, and *Blackstone v. Miller*, 188 U. S., 206, where in the last case Judge Holmes, in the progress of his opinion, states that the case of *State Tax on Foreign Held Bonds* has been cut down to its precise point by later cases of that court.

In the case of *State Tax on Foreign Held Bonds*, the Supreme Court states: "It is undoubtedly true that actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be



taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies and circulating notes of banking institutions. The former by general usage have acquired the character and are treated as property in the place where they are found, though removed from the domicile of the owner. The latter are treated and passed as money, wherever they are."

Judge Brewer in the case of *New Orleans v. Stempel*, 175 U. S., 309, in the concluding part of his opinion, says: "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner."

Judge Holmes, in the case of *Blackstone v. Miller*, 188 U. S., 206, says: "Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass., 335. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached." And this view of the situs of such property is maintained by the court in the recent case of *Western Assurance Co. v. Halliday*.

But, however, if we are mistaken in the view just expressed, we are clearly of the opinion that the situs of the property in question for the purposes of taxation is in this State, where it is here used and employed in furtherance of the business in which the Fidelity and Deposit Company is engaged. If we treat the securities as intangible property, its situs here for business purposes confers jurisdiction upon the State to tax it, for it would be unjust that it should receive the protection of the government of its actual situs without requiring it to contribute to the support of that government. In cases of this character, the fiction of the law that places intangible property at the domicile of the owner, has been, by many well considered cases, made to yield to the law of the actual situs of the property. In *Pullman Car Co. v. Pennsylvania*, 141 U. S., 18, it is said:

"No general principles of law are better settled or more fundamental than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule expressed in the maxim '*mobilia sequuntur personam*,' by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green v. Van Bushkirk*, 72 U. S., 307; *Hervey v. Rhode Island Locomotive*



Works, 92 U. S., 664; Harkness v. Russell, 118 U. S., 663; Walworth v. Harris, 129 U. S., 355. As observed by Mr. Justice Story, in his commentaries just cited, 'Although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate therein.' For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen or resident of the State which imposes the tax." The court then proceeds to cite many cases of the Supreme Court of the United States in accord with this view.

In the case just cited the property was admittedly of a tangible nature. But, as said by the Supreme Court in the case of *Eidman v. Martinez*, 184 U. S., 382, the same principle has been applied not only to tangible property but to credits and notes, citing the case of *Tappan v. Merchants Nat. Bank*, 19 Wall., 490; *Savings and Loan Association v. Multnomah County*, 169 U. S., 421; *New Orleans v. Stempel*, 175 U. S., 309, and *Bristol v. Washington County*, 177 U. S., 133. And in the course of the opinion delivered in *Eidman v. Martinez*, the court says: "Recent cases in this court have affirmed very broadly the right of the Legislature to tax the local property of nonresidents, and particularly of corporations who are permitted by comity to do business within the State." Citing many cases, among which is the recent case of *Adams Express Co. v. Ohio State Auditor*, 166 U. S., 185, where the question is discussed as to the power of the State to tax the tangible as well as the intangible property of a nonresident corporation.

The case of *Savings and Loan Association v. Multnomah County*, 169 U. S., 423, was where a citizen of California objected to a tax being imposed upon his mortgages and notes secured on land in Oregon. The court held that these evidences of debt were properly taxed in Oregon.

*Bristol v. Washington County*, 177 U. S., 133; *New Orleans v. Stempel*, 175 U. S., 313; *Buck v. Miller*, 37 Law. Rep. Ann., 385, and the recent case of the *Jesse French Piano and Organ Co. v. City of Dallas*, 2 Ct. Rep., 261, in which the Supreme Court of this State refused a writ of error, were cases in which taxes were imposed upon credits, bills, bonds and notes by the State where they were actually situated, although the owners resided in other States; and this principle is recognized by the Supreme Court of the United States in the recent case of *Blackstone v. Miller*, 188 U. S., 204. These cases, as well as many cited in the opinions there delivered, and many other cases bearing upon this subject which could be named by this court, in effect announce the doctrine that where the owner of property of that character carried



it into a State different from that of his domicile, there to be employed in a business purpose and use, the situs of its taxation was in the State where it was so used. As expressed by the Supreme Court of Minnesota *In re Jefferson*, 25 Minn., 215, such conduct of the owner fixed a business situs of the property different from that of his domicile.

In *Tappan v. Merchants Nat. Bank*, 86 U. S., 490, it is said, in speaking of the shares of stock in national banks: "They are a species of personal property which is in one sense intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purpose of taxation, and give them a situs of their own. \* \* \*

"We do not understand the counsel for the appellee to dispute this power, where the property is tangible, and capable of having, so to speak, an actual situs of its own, but he claims that if it is intangible, it can not be separated from the person of its owner. It must be borne in mind that all this property, intangible though it may be, is within the State. That which belongs to nonresidents is there by operation of law. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to the jurisdiction of the State, and they must obey its will when kept within the limits of constitutional power. The question is then presented whether the general assembly having complete jurisdiction over the person and the property, could separate a bank share from the person of the owner for the purposes of taxation. It has never been doubted that it was a proper exercise of legislative power and discretion to separate the interest of a partner in partnership property from his person for that purpose, and to cause him to be taxed on its account at the place where the business of the partnership was carried on; and this, too, without reference to the character of the business or the property. The partnership may have been formed for the purpose of carrying on mercantile, banking, brokerage or stock business. The property may be tangible, or intangible, goods on the shelf, or debts due for goods sold. The interest of the partner in all the property is made taxable at the place where the business is located. A share of stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts its business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there,



and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government."

In *Finch v. York County*, 19 Nev., where notes and mortgages were held by an agent in the State where they were taxed, the court said: "The power of the Legislature to separate for the purposes of taxation the situs of the personal property, whether of a tangible nature or in the form of choses in action, from the domicile of the owner, is unquestioned, and if such property, in any form, is within its jurisdiction, it may tax it."

In *Tazewell County v. Davenport*, 40 Ill., 197, the plaintiff, a non-resident, carried on a permanent business of loaning money, and remained within the State long enough to transact his business. The court held that his money and credits employed in such business, and also money and credits of others residing out of the State, but used and controlled by him as their agent, were subject to taxation within the State. The case of *People v. Smith*, 88 N. Y., 576, is to the same effect. Also *Poppleton v. Yamhill County*, 18 Ore., 377; *Swallow v. Toms*, 16 Kan., 58; *Redmond v. Rutherford*, 87 N. C., 122; *Jefferson Estate*, 35 Minn., 215; In the Matter of *McMahon*, 66 How. Prac., 190.

In *Marye v. Railway Co.*, 127 U. S., 117, it is held that where property is brought into the State, and used by a corporation, it may be taxed.

In *Hubbard v. Brush*, 61 Ohio, 252, the court says: "If men choose to resort to another State or country for authority to organize a corporation for the purpose of engaging in business in this State, or if that was not their original purpose, choose afterwards to plant themselves herein, and in either case transact the business wholly within our borders, and enjoy the protection of our laws, it is only just and reasonable that their property should be subject to taxation herein, as fully as if its organization had been effected under our laws; and the right of taxation should not be defeated nor limited upon the ground that for some other purpose the situs of a part of its property should be regarded as being in the State or country where the corporation is organized. Where foreign corporations voluntarily bring their personal property and business into this State to avail themselves of advantages found here which they believe will enhance the probabilities that the business they intend to pursue will be profitable, they should not be heard to complain of laws which tax them as domestic corporations are taxed by the State. We hold, therefore, that the provisions of section 2744, which makes it the duty of foreign corporations to list, for taxation in this State, their choses in action, where they are held within this State and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the State. This holding finds support in many adjudications, among them which may be cited *People v. Village of Ogdensburg*, 48 N. Y., 390; *Redmond v. Comrs.*, 87 N. C., 122; *State v. St. Louis County Court*, 47 Mo., 594."



This language is quoted with approval in the recent case of *Western Assurance Company v. Halliday et al.*

In view of the rule of law just discussed, the question arises, was the appellee corporation, at the time the taxes were assessed, engaged in business in this State, and were the securities in question employed and used in that business?

The act of the Twenty-fifth Legislature, approved June 10, 1897, found upon page 244 of the session laws, provides for the organization and creation of guaranty and surety companies, and authorizes like companies created by the laws of other States to enter this State for the purpose of carrying on such business, upon a compliance with the law granting them a permit to do business here. Section 2 prescribes that such companies, to be so qualified to act as surety or guarantor, must comply with the requirements of every law of this State applicable to such companies doing business here. It is required that they must have fully paid up and safely invested an unimpaired capital of \$100,000, and must have good available assets exceeding its liabilities, which shall be taken as its capital stock, and must file with the Commissioner of Insurance a copy of its certificate of incorporation, and a written application to do business in this State; and must thereafter make a verified statement of the amount of its paid-up cash capital, its items of investment and generally of its business condition. It must appoint an attorney in this State upon whom process can be served, and shall have on deposit with the Treasurer of this State at least \$50,000 in good securities, worth at par and market value at least that sum, to be held for the benefit of the holders of the obligations of such company. And it is expressly provided that the securities so deposited with the Treasurer are to remain with him in trust to answer any default of said company as surety upon such bonds, undertaking, recognizance or other obligation, established by final judgment, upon which execution may lawfully be issued against said company; said treasurer and his successors in office are required to receive and retain such deposit in trust for the purposes thereafter mentioned. The surety and deposit company has the right to collect the items of interest, dividends and profits upon such securities; and from time to time withdraw the securities and substitute therefor others of equally good character and value to the satisfaction of the Treasurer. The securities so deposited are not subject to levy under writ or process of attachment. It is also provided that such company may, at any time, surrender to the Commissioner of Insurance, Statistics and History its certificate of qualification, and shall thereupon cease to engage in said business of suretyship, and such company shall, thereupon, be entitled to the release and return of its deposit, but in such case, the company shall be required to file with the Treasurer of the State a bond in a sum equal to the whole amount of its liability in the State, if any such liability exists.

It is also provided that if any suit is instituted upon any bond or obligation of any surety company, the proper court of any county where said



bond is filed shall have jurisdiction of said cause, and service therein shall be made upon the attorney of said company or upon the Commissioner of Insurance, and when so made shall be as effectual as service upon the company. And such guaranty and surety companies shall be deemed residents of the county where they may do business, and the doing or performing of any business in any county shall be deemed an acceptance of the provisions of this act. This is provided for in section 6. Section 7 requires that when said company shall refuse or fail to pay any loss incurred in this State within sixty days, the State Treasurer shall, out of the deposit left with him, pay such losses.

The domicile of a corporation is within the jurisdiction that creates it, but it is a well settled principle that foreign corporations, seeking to do business within another jurisdiction, with some exceptions, can only enter it for the purpose of doing business under a permit, when one is required, and the law granting the permission can impose conditions that practically submit such corporation to the jurisdiction of the State where admitted, so far as pertains to the business there carried on.

When the appellee, The Fidelity and Deposit Company, entered this State, it subscribed to the laws that authorized it to do so, and submitted itself, for the purposes mentioned in the statute quoted, to the jurisdiction of this State. And when it voluntarily brought its property here to be used and employed in connection with its business, and that was necessary to be deposited with the State Treasurer under the law that authorized it to do business, as a predicate upon which its business operations should be based, it likewise submitted such property to the jurisdiction of this State for the purposes of taxation. The property when brought and used here for business purposes, acquired in this State a business situs.

It is contended that the property was brought here merely as a deposit as an evidence of good faith upon the part of the appellee that it would comply with and observe the terms of the law that authorized it to do business within this State.

We can not accept this view, as we think that the deposit is more than a pledge of good faith, and is more than one merely of a temporary nature. There is nothing in the facts as stated that indicates that the Fidelity and Deposit Company was merely temporarily in this State, or that its securities were merely a temporary deposit. On the other hand it is clearly indicated that the deposit was intended to be permanent, just so long as the company intended to do business within this State. They were here three years prior to the time that the property was assessed for taxes, and there is nothing in the record indicating an intention to suspend business here. The property was here for that length of time in the custody of the State Treasurer, voluntarily placed there by the foreign corporation, which it is admitted had accepted the benefits of the law, and that it was engaged in business within this State. It is true that the securities in question were not loaned out to its customers, but it was a fund that attracted customers, which could only be



obtained by the corporation so long as the funds remained upon deposit. Without the deposit of these securities here in this State, they could transact no business. It stood as a bailment, held here by the Treasurer for the purpose of securing the guaranty contracts entered into by the corporation within this State; and the security so held was an incident of those contracts and a part of the same. Bringing the securities here and pledging them for the payment of the obligations which the corporation might enter into in this State, evidences the fact that this fund was being used to operate upon in their business here. Locating and pledging it here as security for its obligations invested the fund with a character of use subjecting it to the jurisdiction of this State, as much so as if the securities were brought here and used by loaning them out in a business way, through its trustees or agents within this State.

On this subject and the one previously discussed, the following authorities are instructive, all of which have been previously cited: In the case of *Buck v. Miller*, where bonds, stocks and notes were assessed in Indiana, where they were situated, but owned by a nonresident, it was in effect held that such personal property within the State is assessable for the taxes, though the owner resides elsewhere. The court in passing upon this question uses this language:

"Notwithstanding all this, we are still firmly of the opinion as heretofore expressed, that if personal property is used in business in this State, it ought to be assessed for taxes, even though the owner may claim to be a citizen and domiciled in another State; and this must be true of moneys and credits, as well as other forms of personal property. We are still of the opinion also, that the business may be done in buying and selling property, including bonds, stocks, notes and mortgages, and in making loans and investments and reloaning them from year to year; and that if moneys and securities so used are retained in this State, they should be subject to taxation here, quite the same as any other kind of property."

In the case of *Bristol v. Washington County*, *supra*, notes and mortgages were taxed by the State of Minnesota, which belonged to a citizen of another State. The law imposing the tax was held to be constitutional. The court in the progress of the opinion says:

"The creditor, however, may give it a business situs elsewhere, as where he places it in the hands of an agent for collection or renewal, with a view of reloaning the money and keeping it invested as a permanent business." And quoting from the case of *Tazewell v. Davenport*, 40 Ill., says: "The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now here was property in this State, not for a mere temporary purpose, but as permanently as though the owner resided here; it was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of the State,—it had to rely on those laws for



the force and validity of the contracts on the loans and the preservation and enforcement of the securities."

In *New Orleans v. Stempel*, where certain taxes were levied on money on deposit, and also on money loaned at interest, credits and bills receivable by the laws of Louisiana, where they were situated, but owned by a nonresident, Judge Brewer in the progress of the opinion in effect holds that there was no constitutional impediment in the way of the taxation imposed by the laws of Louisiana; that the actual situs of such property was in Louisiana, where it was employed and used by the owner. This is a well considered case upon the subject of the situs of what is generally understood to be intangible personal property; and it, with the cases therein cited, is strongly in point on the principal questions passed upon by us in the decision of this case.

In a well considered opinion by Associate Justice Fly, in the case of *Jesse French Piano and Organ Company v. City of Dallas*, where a number of the authorities upon this subject are cited, and which explains the case of *Ferris v. Kimble*, 75 Texas, and the case of *Primm v. Fort*, 57 S. W. Rep., decided by this court, and distinguishes them from the case in which he delivers the opinion, it is held that notes in this State used in the business of a foreign corporation were located here for taxation.

We now come to cases which are more nearly in point, if not directly so, upon the questions involved in this case. A law of New York, somewhat similar to the statute under which the securities in this case were deposited with the Treasurer, required foreign insurance companies, in order to do business, to make a deposit with the State Comptroller. In construing that law, the court in the case of *British Com. Insurance Co. v. Com. of Taxes*, 18 Abbott, 130, same case, 32 N. Y., 32, uses this language:

"The deposit with the comptroller is necessarily made in connection with the business of the company. Without it, they could do no business. It is therefore used in the business of the company, and in fact forms its capital in this State, which is liable to its creditors, and comes within the definition of capital, as defined in the *Mutual Insurance Co. v. Supervisors*, 4 Comst., 442. These securities so deposited with the comptroller form the same kind of capital as that of a domestic corporation for a similar purpose, in which the capital is the security for those who deal with it. Neither is actually invested in business and used for that purpose, but forms the basis on which the business is transacted, and the security from the payment of claims is to be enforced."

"In *People v. Home Insurance Co.*, 29 Cal., 533, bonds deposited with a banking concern, as trustee to hold for the protection of the policy holders in the State in a foreign insurance company required to make such a deposit as a condition to doing business, were held to be taxable by the State as a portion of the capital of the company employed in its business in California. To the same effect is *International Life Ins. Co. v. Commonwealth*, 28 Barber, 318."

These are cases cited and the quotation is extracted from the opinion



in *Western Assurance Co. v. Halliday*, which latter case is directly in point on the questions involved in this appeal. This case is not reported, but we have before us a copy of the opinion delivered by Judge Lurton, on November 3, 1903, of the Circuit Court of Appeals for the Sixth Circuit. It is a well considered opinion, and, in effect, passes upon every question involved in this case; as in our opinion the tax laws of Ohio, where the case originated, are somewhat similar to the laws regulating taxation here. In that case, the Western Assurance Company, a corporation domiciled in Canada, brought a suit against the appellees to restrain the collection of taxes imposed and levied upon a deposit of Ohio municipal bonds, held by the Treasurer of that State as security for the policy holders of the insurance company. We gather from the opinion that the State Treasurer, or the superintendent of insurance, held these bonds as trustee for the benefit of the policy holders under a law somewhat similar to the statute under which the deposit was made in the case before us. The same points against the validity of the tax were urged in that case as are raised here. The court in effect held, after citing many of the authorities named in this opinion and some others, that the bonds in question, as property, had assumed a tangible form, or if not, they were voluntarily placed in the State of Ohio by the appellant as the basis for the prosecution of its business, and that in either aspect, they assumed an actual situs within the State of Ohio; and as the law of that State was broad enough to include property of this class in its scheme of taxation, it was subject to taxes there, although the domicile of its owner was elsewhere.

The next important question to be determined is, whether this State, by its laws of taxation, includes and embraces property of this character, and whether it was properly rendered and assessed for taxation.

Article 8, section 11, of the Constitution requires that all property, whether owned by persons or corporations, shall be assessed for taxation, and the taxes paid in the county where it is situated. The following provisions of the law, as stated in Sayles' Civil Statutes and in some session laws which will be noticed, bear upon this subject:

"Article 5061. All property, real, personal or mixed, except as may be hereafter expressly exempted, is subject to taxation, and the same shall be listed as herein prescribed.

"Art. 5063. Personal property shall, for the purposes of taxation, be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by citizens of the State, whether the same be in or out of the State. All ships, boats and vessels belonging to inhabitants of this State, if registered in this State, whether at home or abroad, and all capital invested therein; all moneys at interest, either within or without this State, due the person to be taxed, over and above what he pays interest for, and all other debts due such persons, over and above their indebtedness; all public stocks and securities; all stock in turnpikes, railroads, canals and other corporations (except



national banks) out of the State owned by inhabitants of this State; all personal estate of moneyed corporations, whether the owners thereof reside in or out of this State, and the income of any annuity, unless the capital of such annuity be taxed within this State.

"Art. 5176. All real and personal property held or owned by any person in this State shall be liable for all State taxes and county taxes due by the owner thereof, including taxes on real estate, personal property and poll taxes."

Acts of the Twenty-fourth Legislature, pages 96 and 116, and first called session of the Twenty-sixth Legislature, provide that there shall be collected an annual ad valorem State school tax, and an annual ad valorem State tax on all real property situated, and on all personal property owned in the State. Acts of the Twenty-fifth Legislature, page 203, require that all property, real and personal, such as not required to be listed and assessed otherwise, shall be assessed in the county where it is situated.

"Arts. 5067 and 5084, sec. a. All property of corporations shall be assessed and shall be listed by the president or agent."

"Subdivision 6, art. 5067. The property of a person for whose benefit it is held in trust, shall be listed by the trustee of the estate.

"Art. 5074. Persons required to list property on behalf of others, shall list it in the same manner in which they are required to list their own; but they shall list it separately from their own, specifying in each case the name of the person, estate, company or corporation to whom it belongs."

Subdivisions 32, 33 and 39, art. 5076, require that the statement describing the property to be rendered for taxation shall include the amount and value of bonds and stocks, other than United States bonds; the amount and value of shares of capital stock of companies and associations not incorporated by the laws of this State; and subdivision 35: "Shall state the value of all property of companies and corporations, other than property hereinbefore enumerated."

"Art. 5084. All property of private corporations, except in cases where some other provision is made by law, shall be assessed in the name of the corporation, and in collecting the taxes on the same, all personal property of such corporation shall be liable to be seized wherever the same may be found in the county, and sold in the same manner as the property of individuals may be sold."

"Subdivision 5, art. 5088. Personal property of every description shall be valued at its true and full value." Subdivision 7; "Every credit for a sum certain, payable either in money or property of any kind, shall be valued at its full value of the same so payable."

Article 5118, regulating the manner and form of assessing, in subdivision 37: "The amount of solvent credits of bank, banker, broker, stock jobber, or any other person." Subdivision 38: "The amount and value of bonds and stocks." Subdivision 40: "The value of prop-



erty of companies and corporations, other than property hereinbefore enumerated." This article requires this character of property to be listed for taxation.

Article 5121 provides that if the assessor of taxes shall discover in his county any property, or outside of his county, but belonging to a resident of the county, any personal property which has not been assessed or rendered for every year for two years past, he shall list and assess the same.

"Art. 5107. In all cases of failure to obtain a statement of real and personal property from any cause, it shall be the duty of the assessor of taxes to ascertain the amount and value of such property, and assess the same as he believes to be true and full value, and such assessment shall be as valid and binding as if such property had been rendered by the proper owner thereon."

Article 5121a provides that the collector of taxes shall assess unrendered property and collect the taxes on the same.

The term personal property, when employed in a tax law, includes bonds, notes, credits and choses in action. *Jesse French Piano and Organ Co. v. City of Dallas*, 2 Ct. Rep., 261; *Buck v. Miller*, 37 Law. Rep. Ann., 388; *Boyd v. Selma*, 16 Law. Rep. Ann., 731; *Western Assurance Co. v. Halliday*, and 22 Am. and Eng. Enc. of Law, 747.

It is clear from these authorities and the provisions of the statutes quoted, that property of this class is embraced within the scheme of taxation provided for in this State; and it can not be successfully contended that article 5063 only applies to property of citizens of this State. This is practically the effect of the ruling made in *Jesse French Piano and Organ Co. v. City of Dallas*, in which case, as said before, a writ of error was refused. The court there gave effect to the provision of the statute taxing all property, real, personal and mixed, as applying to that owned by a nonresident situated within this State, as well as to property owned by citizens of the State.

The statute in express terms and by necessary implication includes the intangible personal property of the citizens of the State; and it is clear, in our opinion, from all the provisions of the law relating to the subject of taxation, that it was not the intention to exclude from taxation property owned by nonresidents that had a taxable situs within this State. If the property, although of an intangible nature, acquired a situs here, it was clearly subject to taxation, because the law and the Constitution impose taxes upon all property within this State, and as said in article 5176, "whether held or owned by any person in this State."

We are also of the opinion that the language of article 5063, to the effect, "all personal estate of moneyed corporations, whether the owners thereof reside in or out of the State," is a classification of personal property which embraces the kind in controversy, upon which the taxes are sought to be imposed. This is an express provision providing for taxa-



tion of the personal estate of moneyed corporations, although the owner may reside out of the State. The owner in this instance is the Fidelity and Deposit Company, and its residence is out of the State, and it only remains to be determined whether the expression "personal estate" will include this character of property, and whether the appellee is a "moneyed corporation."

The language here used is not to be applied in a restrictive sense. The word "estate" includes all species of property, applicable alike to real and personal. 11 Am and Eng. Enc. of Law, 2 ed., 358, 363; and in its broadest sense is held to include choses in action. *Id.*, 360.

The expression "moneyed corporation" was evidently intended to mean all classes of corporations organized and created for business purposes, as distinguishable from public or charitable or other corporations, which are exempted by law from taxation. This we believe to be the usual meaning applied and given to this expression. The Legislature evidently did not intend to use it in a restrictive sense, as applied only to corporations that dealt exclusively in money, for there are certain portions of the statute that relate and apply especially to banks and banking corporations, prescribing the manner of assessing their property, and classifying the property subject to taxation. If it had been the intention of the Legislature to apply this expression exclusively to banks, it would have been unnecessary to have so particularly provided the laws regulating the assessment and taxation of property owned by those institutions. Further, we ought not to ascribe to the Legislature an intention and purpose to create an inequality and discrimination in selecting the subjects of classification, and in providing a remedy for the assessment and collection of taxes; and that they intended to create an exemption in favor of one class, when those of another class similarly situated are subject to taxation.

If the expression "moneyed corporation" is to be applied in a narrow and restrictive sense, the effect would be to create a taxation upon those corporations that handle and deal in money as their business, and would exclude from the operation of the law many corporations engaged in this State in business enterprises which are doubtless as profitable to them as is the case of those engaged in the banking and money loaning business. We should apply this expression in a common sense way, so as to reach, if necessary, the intention of the Legislature. That intention, in our opinion, being, as evidenced by all the laws upon this subject, to tax the property of all corporations which has a permanent situs in this State. The expressions "moneyed business" or "moneyed man" are often used, and in their common acceptance and generally understood meaning, we do not apply them solely to the business of handling and loaning money, or to a man whose property merely consists of money; but, as said by the Supreme Court of Pennsylvania, in *Jacob's Estate*, 140 Pa. St., 274, "that the word money is properly known and used as indicating property of every description is well known. Thus it is very common to refer to a person as a 'moneyed man' because of



his large possessions, yet those possessions may consist exclusively of real estate."

We are of opinion that the property in question was properly assessed and rendered for taxation. The law authorizes the assessor and collector to assess taxes on unrendered property; and if we were prepared to hold that the rendition by the State Treasurer was without authority, the fact that it was actually assessed by the tax collector of the county where it was situated would be a sufficient compliance with the law. The adoption of the rendition by the collector tendered him by the Treasurer, although such rendition was unauthorized, would make the assessment in law that of the collector; which assessment he is required to make when property within his county is discovered to be not assessed. But we are of the opinion that the State Treasurer, as the legal custodian of the property in question, was in effect the trustee or agent of the foreign corporation for the purpose of rendering the property for taxes. Such property was held by the Treasurer as trustee, and under the provisions of the law property held in this State by an agent or trustee is taxable, and the agent or trustee must render it for that purpose.

The treasurer of the State, in relation to the property in question and the duty that he owes the owner, is more than a mere naked bailee. It is true that the statute prescribes his duty with reference to the property, but it is not believed that the intention in limiting his authority over it was to affect those provisions of the law that require the agent or trustee to render the property for taxation. They can be construed together and consistently made to harmonize. He is a trustee or agent created by law and the act of the foreign corporation in placing the securities in question in his possession, and for a dereliction of duty, which is not probable, such as in the nature of a conversion of the securities, the corporation, the owner, would have a cause of action against him for their value,—not only a mere action at law, but for an accounting in equity, such as any principal might have against an agent who is charged with the possession of funds, whether such possession is obtained by contract or by express provision of law.

Guardians and administrators and other officials often come into possession of property by a mere provision of some statute that confers possession upon them. Although they occupy no contractual relation with the owner of the property creating an agency, they can be held accountable in equity to an accounting and for the proceeds in their hands.

This, in our opinion, is the status of the Treasurer in so far as his relation and duty to the corporation is concerned. He has the lawful possession of the property, and the law under which he receives it, together with the conduct of the corporation in delivering it to him, created a trust and invested him with a character of agency.

The law that requires the agent or trustee to render does not undertake to define or classify the kind of agents upon whom this duty is imposed, but the broad expression is used, "agent and trustee;" and



this, in our opinion, embraces every character of agent or trustee known and recognized by the law, that has, either by virtue of law or consent of parties, the lawful possession of the property.

On the last page of the opinion in the case of *Western Assurance Co. v. Halliday*, there is a strong intimation by the court that it was the duty of the party in whose possession the bonds were held, under a law similar to ours, to render the property for taxation.

The fact shown in the record that the property in question is also taxed in the State of Maryland, imposes no obstacle to its taxation in this State, if we are correct in the conclusion that its situation and situs here is of a character that gives this State jurisdiction over it for the purpose of taxation. The taxation by two independent sovereigns, where each has jurisdiction, is not double taxation within the meaning of the law. *Coe v. Errol*, 116 U. S., 517.

The case of *Primm v. Fort*, 57 S. W. Rep., 86, and *Ferris v. Kimble*, 75 Texas, 476, are relied upon by appellee as authority for the judgment of the trial court. Both of these cases have been explained in the case of *Jesse French Piano and Organ Company v. City of Dallas*, as not conflicting with the views there expressed; and we are of the opinion that there is no conflict between this case and the two cited. The facts are entirely different, and there are expressions in the case of *Ferris v. Kimble* which really accord with the views expressed by us, provided we are correct in the conclusion that the property in question in this case has a business situs in Travis County, where it was properly rendered for taxation.

The act of the Twenty-fifth Legislature, session laws of 1897, p. 132, authorizes a recovery of 6 per cent interest upon the taxes due and unpaid, and prescribes a penalty of 10 per cent upon the taxes due.

There being no dispute about the facts, the legal conclusions reached necessarily result in a reversal and rendition of judgment in favor of the appellant. Therefore, judgment will be rendered by this court for the amount sued for with interest on the same, together with the 10 per cent penalty due upon the unpaid taxes. This penalty to be computed upon the principal sum of the taxes due, exclusive of the interest.

*Reversed and rendered.*

Writ of error was refused by the Supreme Court, June 16, 1904.



## J. S. POYNOR V. CHARLES HOLZGRAF ET AL.

Decided March 16, 1904.

**1.—Evidence.**

In a prosecution for breach of a liquor dealer's bond for selling intoxicants to plaintiff's minor son, it was error to permit defendant to prove that such minor was reputed to be or that he was in fact a gambler.

**2.—Same—Age—Comparison.**

In a suit for selling liquor to a minor it was not permissible for defendant to place witnesses on the stand merely to ask them their age, whether for comparison with the appearance of the alleged minor or for any other purpose.

Appeal from the District Court of Bell. Tried below before Hon. John M. Furman.

*A. J. Harris*, for appellant.

*G. W. Tyler* and *J. B. McMahon*, for appellee.

**KEY, ASSOCIATE JUSTICE.**—This is a suit upon a liquor dealer's bond, charging the dealer with unlawfully selling liquor to the plaintiff's minor sons. There was a verdict and judgment for the defendants and the plaintiff has appealed.

The first assignment of error complains of the action of the court in permitting the defendants to prove by the plaintiff that his son, Tom Poynor, one of the parties to whom it was alleged the liquor was unlawfully sold, had the reputation of being a gambler; and the seventh assignment is addressed to the ruling permitting the defendants to prove by Tom Poynor, while on cross-examination, that he was a gambler. The evidence referred to in these assignments was not admissible, and the plaintiff's objections thereto should have been sustained. *Tipton v. Thompson*, 50 S. W. Rep., 641, and cases there cited.

The tenth assignment complains because the defendants were permitted to place four witnesses on the stand and merely prove by each witness his age, the contention being that such proceeding was a "stage play" by the defendants and should not have been permitted. We fail to perceive from the record that the matter complained of was material, or had any bearing, one way or the other, upon the case. If the object of the defendants was to enable the jury to make comparisons between the four witnesses, whose ages ranged from 18 to 21, and the persons to whom it was charged the liquor was sold, we are of opinion that it was not proper to institute such comparisons. And if such was not the object of the proceeding referred to, then it was wholly immaterial, and should not have been permitted.

We are of the opinion that the denunciatory remarks of the defendants' counsel, complained of in the twelfth bill of exceptions, crossed



the border line of legitimate discussion, and should not be repeated upon another trial.

On all the other points presented in the brief we rule against appellant.

For the errors indicated, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## W. A. KESTERSON ET AL. V. JOHN W. BAILEY ET AL.

Decided March 16, 1904.

**1.—Will—Child Unborn—Estate in Remainder.**

A clause in a will bequeathing a tract of land to the testator's wife and at her death to a child then unborn, held to vest an estate in remainder in the child upon its being born alive.

**2.—Limitation—Remainder Interest—Life Estate.**

The statute of limitation does not begin to run against persons claiming under a tenant in remainder until the death of the tenant for life,—holding under the latter not being adverse to the remainderman.

**3.—Same—Pleading.**

In answering to a plea of limitation those claiming under one who had an estate in remainder are not required to plead any exception which would prevent the running of the statute of limitation, since persons having a life estate in the land had the right of possession by virtue thereof and their possession was not adverse to those entitled to the remainder.

**4.—Heirs—Remainderman.**

A half brother, born after the death of one owning a remainder in land, is not an heir of such remainderman; the estate in remainder vested in the existing heirs of the latter at her death.

**5.—Tenants in Common—Improvements—Partition.**

The recovery by tenants in common of an undivided half interest in land, without partition, does not affect the claim of the tenants in possession for improvements; under subsequent proceedings for partition defendants should be awarded the half containing improvements made by them, or as much of them as practicable, regardless of the question of good faith.

**6.—Improvements in Good Faith—Statutory Plea.**

Good faith is alike indispensable to the statutory plea of improvements where plaintiff recovers an undivided interest or when he recovers it all.

**7.—Practice on Appeal—Objection to Evidence.**

Objections to the admission of evidence, in order to be considered on appeal, should state the exact ground upon which the evidence is objected to.

## ON MOTION FOR REHEARING.

**8.—Will—Unborn Child—Contingent Remainder—Rule in Shelley's Case.**

The rule in Shelley's case does not apply to a devise of a contingent remainder to the child en ventre sa mere of the devisee of the life estate, though described as her heir; the estate in remainder vests in such child, if born alive, and passes to its heirs upon its death.

Appeal from the District Court of Camp. Tried below before Hon. J. M. Talbot.

*E. A. King and Morris & Crow*, for appellants.

*M. M. Smith and W. B. Heath*, for appellees.

JAMES, CHIEF JUSTICE.—Item second of the will of Elijah Bailey, who died in September, 1866, reads: "I give and bequeath to Edna Y. Bailey, my wife, the tract of land in which I now reside known as the Dean place containing 409 acres of land, more or less, and I give and bequeath also that at the death of Edna Y. Bailey, my wife, said land be and the same are hereby set apart for a child which be unborn, which be the heir of Edna Y. Bailey, my wife, child not yet bornd."



The child was born about a month after Elijah's death, which was named Gertrude, and which died when nine months old.

In order to determine the first question raised, viz., the construction of said clause, it is not necessary to state the facts further than that appellants hold the land from and under the mother, and the title of the parties depends on whether or not the mother took the fee or only a life estate, appellees, who are the plaintiffs, claiming under the child Gertrude, upon the theory that the latter owned the remainder. We are of opinion the trial court was correct in holding that the child, being born alive, took a vested estate in remainder. *Simonton v. White*, 93 Texas, 55.

The judgment was for plaintiffs for an undivided half of the land, the mother inheriting from the child the other half. The fourth assignment is that the court erred in giving judgment for plaintiffs, since the undisputed facts show defendants had acquired title to all by limitations. The mother lived until December 13, 1901, and this action was begun on April 26, 1902. The statute did not begin to run, as the right of action did not accrue, until her death. *Beaty v. Clymer*, 75 S. W. Rep., 540, and cases cited. It is argued under this assignment that plaintiffs did not, in reply to the plea of limitations, plead any exception which would prevent the running of the statute. This was not necessary, for if Mrs. Bailey and her assignees, the defendants, had a life estate in the land, they had the right of possession by virtue thereof and their possession was not adverse to those entitled to the remainder.

The fifth assignment is that the court erred in rendering judgment for plaintiffs for so much of the land as belongs to Ben W. C. Russell, a son of Edna Y. Russell (by a subsequent husband), who was a half brother of Gertrude, under whom plaintiffs claim and recover as her heirs, since defendants hold the title in part of Ben W. C. Russell, and any further interest he may have in said land is an outstanding title in him, and he was as much an heir of Gertrude as any one of the plaintiffs.

It appears that Ben W. C. Russell was born of a marriage which took place after the death of Gertrude. The latter title was vested, and was inherited by those upon whom descent was cast at the time of her death. *Blythe v. Easterling*, 20 Texas, 565; *Hornsby v. Bacon*, 20 Texas, 556.

The sixth assignment refers to the denial of any allowance for improvements in good faith.

This action was brought for the entire tract, and plaintiffs have recovered an undivided half, and were found to be tenants in common with defendants. There was no prayer for partition, hence there has been and can be no adjudication in this cause as to defendants' right to improvements which are ascertainable only in partition proceedings. We may here state that if a partition of the land could be fairly made



so as to give defendants that portion containing all, or if not all then as far as practicable the substantial portion of the improvements made by them, this they would be entitled to regardless of the question of good faith. *Mahon v. Barnett*, 45 S. W. Rep., 26; *Tevis v. Collier*, 84 Texas, 640. It seems to us that the judgment in this case ought not to have the effect of cutting off the above right in some future suit for partition.

The plea of improvements interposed here was the statutory one, in order to sustain which good faith in making the improvements is indispensable. The plea is applicable alike when plaintiff recovers an undivided interest in the land as where he recovers it all. *Thompson v. Jones*, 77 Texas, 626.

We may pretermit the question whether or not defendants' possession under the circumstances was adverse in the meaning of this statute regarding improvements.

Nor are we prepared to say that the terms of this will were so clear as to charge defendants with knowledge that they had only a life estate, hence we do not attempt to rest this question upon what is decided in *Elam v. Parkhill*, 60 Texas, 581, and *Clift v. Clift*, 72 Texas, 147.

The court found against defendants as to good faith upon evidence which admitted of the finding.

It appears from the seventh assignment that the court allowed John W. Bailey and A. M. Bailey to testify that Edna Y. Russell and her second husband, while in possession of the land, made statements to the effect that they claimed only a life estate under the will. The bill of exceptions does not in terms state the ground of the objection, but it is inferred therefrom that the objection was that such evidence was inadmissible because it was not shown that defendants were present when the statements were made, nor that they had any knowledge of them before they bought. When we give the bill this effect it conflicts with the statement of facts which was filed during the term, and on the same day the bill of exception was, and which states the objection to have been because "the will was in writing and was the best evidence and can not be contradicted." The only issue which said testimony could have materially affected, as we think, was defendants' good faith in reference to improvements. There was other testimony from which the court could have found the want of good faith. The case was tried by the court, and in the absence of testimony that defendants knew of these statements before they made the improvements, it is not at all probable that the court gave them any effect in passing on that issue. However, defendants would not be entitled to have the judgment reversed for error in admitting the evidence, because of its possible effect on that issue, unless the record shows without ambiguity that it was objected to for that reason. If what is recited in the statement of facts be true no such objection was made to it, and the record at best leaves it in doubt. *McMichael v. Truehart*, 48 Texas, 220. If the court admitted the evi-



dence with reference to the objection shown in the statement of facts, it did no harm upon that theory, the court having properly construed the will from its terms.

We are of opinion that there is no error in the judgment, and that it should be affirmed. But inasmuch as defendants, while tenants in common with plaintiffs, improved the land, they are entitled in a partition of the property (that matter not being involved in this action) to the benefit of such improvements regardless of the question of good faith. If the partition can be equitably made in kind so as to give them land containing their improvements as far as practicable, we think the judgment ought to be without prejudice to such right. But all questions concerning improvements in good faith under the statute and dependent on good faith are adjudicated by the present judgment. Modified and affirmed accordingly.

*Modified and affirmed.*

ON MOTION FOR REHEARING.

NEILL, ASSOCIATE JUSTICE.—The word “heirs” is essential to justify the application of the rule in Shelley’s case, just as it is at common law to create an ordinary estate in fee simple. Thus, the rule does not apply when the limitation is to such persons as would be entitled to take from the life tenant by descent. *Handy v. McKean*, 64 Md., 560, 572, 4 Atl. Rep., 125; *Hofsass v. Mann*, 74 Md., 400, 22 Atl. Rep., 65; *Hardage v. Strobe*, 58 Ark., 303, 24 S. W. Rep., 490. Nor does it apply when the word “heirs,” in the phrase “heirs of the body,” is used in the sense of children, and as a word of purchase. *Carrigan v. Drake*, 36 S. W. Rep., 354, 15 S. E. Rep., 339; *Tyler v. Moore*, 42 Pa. St., 371, 17 Atl. Rep., 216; *Jackson v. Jackson*, 127 Ind., 346, 26 N. E. Rep., 897. When applied to wills the rule is not allowed to override the manifest and clearly expressed intention of the testator, but the intention will always be carried into effect if it can be ascertained. *McIlhenny v. McIlhenny*, 137 Ind., 411, 37 N. E. Rep., 147.

The principle upon which the rule in Shelley’s case rests, as illustrated by the authorities cited, excludes its application to a case like this, where the remainder is devised to an unborn child of the devisee of the life estate, though the child is spoken of in the will as the heir of such devisee. In the present case the manifest intention of the testator was that after the death of his wife the remainder of the estate in fee simple should go to her unborn child.

The distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will of deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as



a remainder shall take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depends shall have determined, so that the estate in remainder will never take effect. 2 Washb. Real Prop., 224. A child en ventre sa mere will not be regarded as a child born, unless he is born alive, and though he be regarded, by a fiction of law, as in esse when such *being* is for the benefit of the unborn child, yet if he is never born alive he can not take property under a will or transmit title by inheritance to another.

It would seem therefore to follow that the remainder in the present case was contingent upon the unborn child mentioned in the will being born alive. Had such contingent event never happened, then it may be, as is contended in this motion, that Mrs. Edna Y. Bailey would have taken under the will an estate in fee simple. But such event did occur; and upon the birth of the child the estate in remainder ceased to be contingent and became as much a vested estate in remainder as it would have been had the child Gertrude been born and living when the will was made and the testator died. Therefore upon Gertrude's birth the title to a life estate was in her mother, and the remainder in fee simple in herself. This vested remainder, though the land never came into the actual possession and enjoyment of its owner, was an estate of inheritance, and upon Gertrude's death descended to her heirs as found by the trial court. The motion is overruled.

*Overruled.*

Writ of error refused.



## D. JUNE &amp; Co. ET AL. v. F. L. DOKE ET AL

Decided March 16, 1904.

**1.—Injunction—Return—Judgment—Superior Lien.**

An injunction which did not attack the validity of a judgment foreclosing a lien on property or attempt to stay its execution, but was granted merely to protect property from sale upon which a lien was claimed superior to that held by the parties owning the judgment, might properly be returned to another county than the one in which the judgment was rendered.

**2.—Notice—Builder's Lien—Deed of Trust.**

Notice to the agent of a machinery house that there was a builder's lien on certain houses was notice to his employers, and the builder's lien was superior to a deed of trust subsequently given on such buildings and the machinery therein.

**3.—Builder's Lien—Recording—Constitutional Law.**

Article 16, section 37, of the State Constitution gives a lien upon buildings and lots upon which they are situated to the builder upon his furnishing the material, and the filing and recording of the building contract is not essential to the validity of the lien as to the parties or those dealing with them with notice; and an express lien by contract has the same effect.

**4.—Description of Property.**

Description in building contract and notes given for the erection of the buildings held sufficient where those giving the lien had no other property.

**5.—Constitution—Builder's Lien.**

A "builder's lien," as defined by the Constitution, extends to the lots upon which the buildings are situated as well as the buildings themselves, and the same effect will be given to an express contract for a "builder's lien."

**6.—Liens—Sale to Satisfy.**

Where one has a first lien on the machinery in a gin plant and another a first lien on the building and lots, each having also second liens, the machinery should be sold separately from the building and lots.

**7.—Attorney Fees—Correcting Judgment.**

Agreement as to what should be secured by liens held not to include attorney fees, and judgment allowing such corrected.

Appeal from the District Court of Navarro. Tried below before Hon. L. B. Cobb.

*Callicutt & Call* and *Davis & Cocke*, for appellants.

*McClellan & Prince*, for appellees.

FLY, ASSOCIATE JUSTICE.—This suit was instituted by F. L. Doke against W. M. Mash, J. J. Hall, D. June & Co., composed of D. June and O. S. French, and the Navarro County Farmers Gin and Milling Association, to restrain the sale of lots 6, 7, 8 and 9 as the Southside addition to the city of Corsicana and improvements thereon, and to oblige the defendant to declare that he, F. L. Doke, had superior title to the property; that the property be ordered to be sold and the proceeds be applied first on the payment of debts due by the association to appellant. A temporary injunction was issued by Hon. J. E. Dillard, judge of the Fortieth Judicial District of Texas, and was made returnable to the District Court of Navarro County, which is in the Thirteenth Judicial District. The cause was tried with-



out the aid of a jury, and judgment was rendered perpetuating the injunction, and in favor of D. June & Co. and F. L. Doke for their respective debts against the association and a foreclosure of their respective liens, priority of lien being given on the buildings and lots to F. L. Doke, and a lien subject to the lien of June & Co. on the machinery in the houses. It was directed that the houses and lots be sold in one parcel and the machinery therein in another.

In the early summer of 1901 the Navarro County Farmers Gin and Milling Association was incorporated, having no assets, except the certain lots above mentioned with a house thereon and notes given by its stockholders for the payment of stock subscriptions. The association desired to buy gin machinery and build the necessary houses in which to place it. On July 1, 1901, a contract was made between June & Co. and the association in which it was agreed by the former that they would furnish the machinery necessary for the gin plant and erect the same in buildings to be erected by the latter and certain notes were to be given for the machinery by the association. The contract contained, among others, the following stipulations:

"Whereas the party of the first part did on the 19th day of June make a proposition to the said second party, which was accepted by said second party, and on the 1st day of July, 1901, the said parties hereto by mutual consent modified the said proposition of the said first party, and which said proposition and acceptance by and between the parties hereto, will and does read as follows, to wit: 'That the said first party does sell and agrees to deliver and erect the same in first-class and workmanlike manner in the buildings of the said second party in the city of Corsicana, Texas (the plans of said buildings to be furnished by said first party), the following machinery, to wit: The same specified on our printed order blank, which as a whole, is made a part of this contract.'

"It is agreed that the net earnings of said gin after the payment of the buildings to be erected are paid for are to be applied to the extinguishment of the debt of D. June & Co., inspection of the terms of said notes, as evidenced by the notes of the said corporation by its directors. Note for \$1208.34, due October 15, 1901; note for \$1208.34, due November 15, 1901; note for \$2416.66, due October 15, 1902; note for \$2416.66, due October 15, 1903.

"Said notes to be made payable to the order of D. June & Co., at Waco, Texas, with 8 per cent interest from date of said machinery at the railroad depot mentioned in this order, and if not paid when due the above notes are payable at Waco, Texas, with 10 per cent additional for attorney's fees, if served upon or placed in the hands of an attorney for collection; said notes to be secured by deed of trust (upon the printed form of D. June & Co.) on said machinery, lots and buildings of said second party.

"And in case we receive said machinery, or any part thereof, and fail or refuse to execute said notes and deed of trust lien, said failure or refusal shall, at once, mature and render due and payable at Waco, Texas,



the full amount of this contract, including 10 per cent thereon as attorney fees, if sued on or placed in the hands of an attorney for collection, with the right to at once enforce the lien hereby retained on said machinery to secure the same.

"It is agreed that said machinery is to be located in Navarro County, Texas, at Corsicana, Texas, and shall not become a fixture attached to any realty, but shall remain as personal property, the title remaining in D. June & Co. until the notes and deed of trust have been executed, as herein provided."

On July 12, 1901, the association entered into a contract with F. L. Doke and J. W. Cooper to pay them \$1300 to erect buildings for a gin, the following clause being therein: "It is hereby especially agreed and understood that a builder's lien is retained on the buildings until paid for." On the notes given for the amount to be paid for the buildings was the following indorsement: "It is especially understood that a builder's lien is retained on one certain ginhouse, and accompanying buildings, situated in Corsicana, on South Fifteenth Street, and that the directors hereby waive all claims until within notes are paid in full." The indorsement was signed by the directors of the association at time the notes were executed, and they were made payable to the order of F. L. Doke, who furnished material to build the ginhouse and other houses. Cooper built the houses with the material furnished by Doke; and the notes were given to Doke for the material. Hill, an agent of D. June & Co., was present when the contract for the material was made and knew of its contents, and also knew of the execution of the notes, and the lien. Holderman, the manager for June & Co., knew that the houses were built on credit, and knew they were not paid for when he took the mortgage on the buildings and lots. The terms of the written contract between Doke and the association were agreed on before the contract of July 1, 1901, was made with June & Co., and those terms were afterwards on July 12, 1901, reduced to writing. The houses were completed in the latter part of July, and after the machinery had been delivered and installed on September 21, 1901, the association executed to D. June & Co. a chattel mortgage on the machinery, and on same date executed a deed of trust on the machinery, the lots and "all improvements upon same now, or placed thereon during continuance of this trust."

On June 20, 1902, D. June & Co. sued the association on its debt and mortgage in the District Court of McLennan County, and obtained a judgment for the debt and foreclosure of its lien. On January 30, 1903, an order of sale was issued out of that court, and the property in controversy was seized by J. J. Hall, the sheriff of Navarro County, and W. M. Mash was placed in possession of it to hold it until it was sold. That sale was enjoined in this suit. The findings of fact of the trial judge are sustained by the statement of facts, and are approved by this court.

The first and second assignments of error claim that the court erred



in not dismissing and dissolving the injunction granted in the case, because it was made returnable to the District Court of Navarro County, when it should have been made returnable to the District Court of McLennan County. The injunction sought and obtained in this cause did not attack the judgment rendered in favor of D. June & Co. against the Navarro County Farmers Gin and Milling Association, or prevent its execution, but was merely ancillary to a suit brought to have a lien held by D. June & Co. on certain property declared secondary to that of the plaintiff and to restrain the sale of the property until that question was decided. There was no attack upon the validity of the judgment, no attempt to stay its execution. The effort was to protect certain property from sale upon which a lien was claimed superior to that held by the parties owning the judgment under which an order of sale was issued. As said in *Van Ratcliff v. Call*, 72 Texas, 491: "There can be no doubt that where the execution of the judgment generally is sought to be prevented, or where the writ is granted to stay, that is stop, the execution of a judgment, the statute is imperative and is susceptible of but one construction—that is, that the writ shall be returned or the suit brought in the county where the judgment was rendered. But the law requiring a suit to enjoin the execution of a judgment to be brought in the county of its rendition evidently applies to suits attacking the judgment, questioning its validity, or presenting defenses properly connected with the suit in which it was rendered and which should have been adjudicated therein. It has no application to parties who do not sue to stay or enjoin the execution primarily of the judgment as contemplated by the statute, but who sue to prevent the sale of property alleged to belong to them under a judgment, however valid and regular it may be, to which they are not parties and for the satisfaction of which their property could in no event be subject." The foregoing construction of the statute has not been questioned in any decision of the Supreme Court, but it has been approved. *Leachman v. Capps*, 89 Texas, 690.

In the case of *McCargo v. Smith*, 23 Texas Civ. App., 714, it is said: "The judgment of the district court dismissing this suit for want of jurisdiction must be reversed, because the suit was not brought to enjoin the execution issued out of the county court, but merely to enjoin the sale of lands levied on under that execution. Appellants below were strangers to the record of the county court case, and were clearly entitled to have the district court where the land in controversy is situated determine whether or not they were entitled to enjoin the sale thereof, under execution issued out of the county court, upon the ground, as alleged by them, that the same was not subject to levy and sale as the property of the defendants in execution." That language is directly in point in this case.

The fourth, fifth, sixth and seventh assignments of error complain that certain findings of fact of the trial judge are not sustained by the statement of facts. Our conclusions of fact sustain the findings of fact



of the trial judge, and consequently the assignments of error must be held to be without merit. Hill was not only a salesman, but advised and assisted, as the representative of D. June & Co., in the making of the contract with Doke and also superintended the building and installation of gin plants. He knew about Doke's lien, and Holderman, the manager, knew that the houses were built on credit and that Doke furnished the material.

The sale of the machinery to the association hinged on the erection of the houses. The contract made between June & Co. and the association on July 1, 1901, was conditional on the building of a house to hold the machinery. The contract did not go into effect until the houses were completed. Without them there could be no sale, and Hill, as the agent of D. June & Co., was actively promoting the contract with Doke to build the houses. This was directly within the scope of his employment, because he was a salesman of machinery for D. June & Co. Notice to him of the existence of the lien held by Doke was notice to his employer.

Holderman, the manager in Texas for D. June & Co., contracted for sale of the machinery with the view to the house being built, knew that it must be built on credit, and knew that the Constitution and laws of Texas gave a lien to builders and materialmen. These circumstances, independent of the actual notice given to Hill, were sufficient to put D. June & Co. upon inquiry and charged them with notice. The slightest inquiry would have brought home to Holderman the knowledge that Doke had a lien upon the houses for the material furnished with which to build them. *Farmers and M. Nat. Bank v. Taylor*, 91 Texas, 78.

The words of the instrument dated July 1, 1901, indicate, and the other facts tend to establish, that the sale of the machinery was a conditional one and rested on the completion of houses in which to place the same. The contract was in effect a promise to give a lien when the houses were completed and the machinery delivered. But if it be held that the lien arose on July 1, 1901, there was an absolute agreement on the part of Hill, representing D. June & Co., that Doke's lien should have precedence over any lien held by them. Hill drew the plans for the buildings.

When Doke furnished the material to build the houses for the association he had a lien upon the buildings and lots upon which they were situated under the provisions of section 37, article 16, of the State Constitution, independent of the provisions of the statute. *Strang v. Pray*, 89 Texas, 525. That decision is construed to hold, in an opinion rendered by the Court of Civil Appeals of the Second District, and published, in connection with an opinion of the Supreme Court commending it, in Supreme Court Report, that the filing and recording of the contract or account, as provided in the statute, is not necessary in any case arising between the original contractor and the owner; "that it is only necessary to fix, secure and protect the lien as against subsequent purchasers and mortgagees and lienholders who become so in good faith, for



a valuable consideration, without notice of such claim and lien, and that this is all that the Legislature meant by that statute. It could not prescribe conditions of forfeiture, nor conditions upon which the lien should arise or take effect. The Constitution covered that part of the subject fully by declaring that the contractor who furnished the material or did the work should have the lien. No record within four months, or any other time, is required to give the lien." The Supreme Court said of the opinion: "We deem it unnecessary to attempt to add anything to the clear and satisfactory statement made by said court of the legal principles governing the case." *Farmers and M. Nat. Bank v. Taylor*, 91 Texas, 78.

This court, following the decisions cited, in the case of *Delauney v. Butler*, 55 S. W. Rep., 752, held: "It is unnecessary for us to inquire whether appellee complied with the provisions of the statute concerning registration of his claim, for we understand from the decisions of the Supreme Court that the Constitution, in cases like this, gives the lien, and that the statutory provisions concerning registration of the claim are important only for the protection of the owner of the property, or purchasers, or incumbrancers." See, also, *Texas B. Supply Co. v. Investment Co.*, 22 Texas Civ. App., 349, and *Bassett v. Mills*, 89 Texas, 162.

It follows from the propositions stated in the foregoing decisions that Doke had a lien on the houses and lots of the association in so far as the owner or any other person charged with notice was concerned, regardless of the registration of his claim, and that he could, as a matter of course, establish the identity of the lots by oral testimony.

But if Doke did not obtain the constitutional lien by reason of a failure to file and record his contract, he obtained and held a lien by reason of the express contract between him and the association. The provisions of the statute as to filing and registration can not affect the force and validity of a lien made and agreed to in writing by the parties. It is true that the lien given by the written contract is described as "a builder's lien," but that description would not cause it to be ineffective unless filed and recorded as required for the statutory builder's lien. It is not dependent on the statute except in so far as it may be necessary to consult it, to ascertain the signification and extent of a "builder's lien." Being an express lien, it was binding between the parties and all others affected with notice of it regardless of the fact that it was not filed and recorded.

The conclusion of this court is borne out and sustained by the case of *Lignoski v. Crooker*, 86 Texas, 324, in which it was said: "The liens which they seek to enforce are liens arising from an express contract, and not the statutory liens given to persons who furnish material to make improvements; and so far as Lignoski and wife are concerned, it is wholly unimportant whether the instruments were recorded or not."

It was shown by the evidence that the association had no property but those lots upon which the buildings were erected and the property could



be readily identified, and it follows that the description in the contract and notes was a sufficient designation of the property to fix the liens. *Myers v. Maverick* (Texas Civ. App.), 27 S. W. Rep., 950. A writ of error was granted in the case cited, but the opinion was fully sustained and the judgment affirmed by the Supreme Court. *Houston v. Myers*, 88 Texas, 127.

The lien is described in the contract as a "builder's lien," and evidently has reference to the lien described in the Constitution and statute, because there is no other builder's lien in Texas. In order therefore to arrive at the meaning of the parties when they used the term "builder's lien," resort must be had to the definitions given in the Constitution and statute. By a reference thereto we find that the "builder's lien" extends not only to the house or building erected, but also to the lot or lots of land necessarily connected therewith. We think, therefore, that the court did not err in foreclosing the lien on the lots and the buildings.

The objection to the sale of the machinery and the lots and houses in separate parcels is clearly without merit. If June & Co. have a first lien on the machinery and Doke a first lien on the houses and lots, the only way to arrive at a proper distribution of the funds arising from a sale of the property would be by separate sales.

The agreement as to what was to be secured by the liens in the notes and contract, when read in connection with and in the light of each other, does not seem to contemplate that attorney's fees, if required to be paid, should be secured by a lien on the property. It is doubtful whether the notice given to D. June & Co. as to the lien extended so far as to include the attorney's fees, even though they had been fully provided for in the contract and notes. Evidently the attorney's fees were included by the trial court in the judgment. The judgment was for \$980, which must include \$89.09 fees, which taken from the \$980, leaves \$890.90, the principal and interest of the notes.

Appellants contend that the principal, interest and attorney's fees do not amount to \$980, but a calculation shows that the true sum is \$983.36. Appellants have no cause for complaint, and Doke has not complained.

Appellants made no effort to have the judgment as to the lien for the attorney's fees corrected, although a number of exceptions were filed to the findings of fact and law, and they should not be allowed to cast the appellee Doke in the costs when the matter might have been corrected in the lower court had it been called to the attention of the court.

There are no errors requiring a reversal, and the judgment of the lower court will be corrected so as to give the lien only for the sum of \$890, the amount of the principal and interest, and with that correction so made the judgment will be affirmed.

*Affirmed.*

Writ of error refused.



## D. MORRISON ET AL. V. M. E. BALZER ET AL.

Decided March 17, 1904.

**Married Woman—Conveyance—Ratification.**

The act of a married woman in attempting to convey land by deed to her children, without being joined by her husband and having no power of attorney from him to act as his agent, though professing to act as such agent in conveying, was, in itself, void; but where, after the death of her husband, she had a guardian appointed for her children, represented the land to be theirs, and acquiesced in and received the proceeds of the sale of the land by the guardian, such ratification of the deed estopped her and her heirs to set up title against the purchaser at guardian's sale.

Appeal from the District Court of Orange. Tried below before Hon. W. P. Nicks.

*Holland & Holland*, for appellant.

*Ed. S. Phelps*, for appellee Sue E. Baker.

*Hart & Wingate*, for other appellees.

GARRETT, CHIEF JUSTICE.—Mary E. Balzer joined by her husband William Balzer, Sarah Adeline Richardson joined by her husband Leonard Richardson, and Mary Flavia Watson joined by her husband William Watson, brought a suit of trespass to try title in the District Court of Orange County, September 17, 1898, against Daniel Morrison and W. B. King for the recovery of five certain tracts of land described in the petition. Mary E. Balzer and her husband both died after the institution of the suit. Their death was suggested, and Florence Schriver joined by her husband Victor Schriver, who in the meantime had been brought into the suit as defendants, made themselves parties plaintiff and the suit was afterwards prosecuted in the names of the three married women joined by their husbands as the heirs of their mother, Mary E. Balzer. The defendant Morrison answered by demurrer, pleas of not guilty and limitation. The defendants Schriver and King by answer filed November 10, 1898, disclaimed any interest whatever in the land. At the time of the institution of the suit Daniel Morrison was claiming title to the land in controversy and W. B. King was made defendant on account of a mortgage that had been executed by Morrison to him. This mortgage was dated May 28, 1894, to secure a note for \$3000 payable on or before May 28, 1896. It was duly recorded in Orange County, January 6, 1894. King transferred the note and mortgage in 1895 to A. C. Baker, who died and left it by will to his wife, Sue E. Baker. On April 25, 1900, Morrison executed a renewal note to Sue E. Baker for \$1793.04, the balance due on the original note, and acknowledged the full force and effect of the mortgage. Sue E. Baker was also made a party defendant, when it does not appear, but she and King filed their original answer September 29,



1902, and their amended original answer October 8, 1902, in which the execution of the original note and mortgage and its assignment and of the renewal note were pleaded; the defendant King disclaimed any interest in the note and mortgage, and the defendant Sue E. Baker prayed for judgment and foreclosure against Morrison and the other defendants. On August 6, 1900, Morrison conveyed the land to D. Call; on February 12, 1901, Call conveyed to J. W. Link an undivided one-fourth interest therein, and on March 7, 1901, Call conveyed to Charles M. Rein an undivided one-half interest. These vendees were afterwards brought into the suit as defendants. Jno. T. Hart filed an intervention September 22, 1902, claiming one-half of the land under a contract with the plaintiffs. On September 2, 1901, Sue E. Baker brought an original suit against all of the plaintiffs and defendants in the suit of trespass to try title for recovery on her debt as evidenced by the renewal note and foreclosure of the mortgage executed by Morrison to King. The two causes were consolidated and on trial below by the court without a jury judgment was rendered in favor of the plaintiffs and intervener Hart for an undivided one-half of the four tracts of the land sued for and first described, and in favor of the defendants Call, Link and Rein for the other half interest in said four tracts and for all of the fifth tract described in the petition, and in favor of Sue E. Baker for the amount of her demand with a foreclosure of the mortgage on the lands decreed to the defendants Call, Link and Rein. D. Call, J. W. Link and Charles M. Rein have appealed.

John Merriman was common source. He conveyed the land in controversy to C. L. Bonville and Mary Ella Bonville by a deed dated March 23, 1869, which was duly acknowledged and recorded. Mary Ella Bonville was his daughter and C. L. Bonville was her husband. C. L. Bonville died and his widow, Mary Ella, was married to P. P. Province, February 24, 1876. Province died May 24, 1878, and the widow Mary Ella afterwards became the wife of William Balzer and was the plaintiff Mary Ella Balzer. By her first husband Bonville she had two children, daughters, the plaintiffs Sarah Adeline Richardson and Mary Flavia Watson, and by her second husband, Province, she had one child, a daughter, the plaintiff Florence Schriver. She died July 31, 1901, and her husband William Balzer died August 21, 1901. The plaintiffs Adeline Richardson, Maria Flavia Watson and Florence Schriver are her sole heirs.

On June 8, 1877, while she was the wife of P. P. Province, the said Mary Ella Province executed a deed to her children Sarah Adeline Bonville, Mary Flavia Bonville and Florence Province undertaking to convey to them the land in controversy. The instrument recited that the grantor was joined by her husband, P. P. Province, and that it was executed in consideration of one dollar and love and affection. It was signed "M. E. Province" and "P. P. Province by M. E. Province." It was acknowledged by M. E. Province before R. H. Smith, clerk of



the County Court of Orange County. The certificate was in form as of the privy acknowledgment of a married woman as to Mary Ella Province; but it recited also that she acknowledged that she executed the deed for herself and as agent for her husband, P. P. Province. It was neither signed nor acknowledged by him or his authority. When the deed was executed Mary Ella Province and P. P. Province were living together as husband and wife. The defendants undertook to show that P. P. Province had abandoned his wife when the deed was executed by evidence that he was a fugitive from justice, was continually evading the officers of the law, having no fixed domicile, was an habitual drunkard and did no work to support his family, and finally died in jail in Grimes County. But the deposition of plaintiff Mary Ella Balzer, taken in behalf of the plaintiffs, was that they were living together as husband and wife at the time of the execution of the deed, and the finding of the court to that effect is fully sustained by the evidence.

After the death of Province and while the mother of plaintiffs, Mary Ella Province, was a feme sole, she waived in writing her right to letters of guardianship of the estate of her minor children and requested that A. M. Rogers be appointed by the county court as their guardian. The waiver was indorsed upon an application for letters of guardianship which recited "that said minors (the Bonville children) owned by right of inheritance from their father an undivided one-half interest in two tracts of land, one containing 120 acres being a part of the Nathan Cordray survey estimated to be worth some five hundred dollars." "And they and their sister Florence Lillian Province, age 4 years, hold the other half interest in said tracts of land and lot by deed from their mother, Mrs. M. E. Province." The land was regularly sold by the guardian and conveyed to the defendant Daniel Morrison. The mother knew all about the sale and gave her consent thereto and approval thereof and received the purchase money. She begged Morrison to buy the land for the reason stated to him that she wanted some money to buy groceries and clothes for the children and to prepare them for school. The land was conveyed by Morrison to the defendant Call and by him to Link and to Rein as above stated. On November 7, 1898, the plaintiff Florence Schriver joined by her husband conveyed the land to Dan Morrison by a general warranty deed.

The note and mortgage by Morrison to King were executed and transferred by the latter to A. C. Baker and came into the hands of the defendant Sue E. Baker as above stated. The trial court found as a fact that the defendants Call, Link and Rein bought the land with notice that the defendant Sue E. Baker was the owner of the debt sued on and the mortgage. This finding is not questioned by any proper assignment of error.

The evidence was sufficient to support the conclusion of the trial



court that Mary Ella Province and P. P. Province were living together as husband and wife at the time of the attempted execution of the deed by her to her children, the plaintiffs. The deed was therefore void. No presumption could be indulged in favor of a power of attorney from Province to his wife in face of the direct testimony that there was none; and the land was not conveyed for the purpose of buying necessities, but was attempted to be put in the name of the children to protect it from the grantor's husband. But the subsequent conduct of the mother, coupled with the deed and the recitals therein, was a ratification of the deed and created an estoppel against her and the plaintiffs to set up title against the purchaser at the guardian's sale. She was active in procuring the guardianship and treated the deed as valid and solicited the purchaser at the sale to buy the land and received the proceeds. *Stafford v. Harris*, 82 Texas, 178.

The plaintiffs would not be estopped by the deed of the guardian from setting up an after acquired title, but the title of their mother passed to them by ratification and estoppel and was conveyed by the guardian to the defendant Dan Morrison, and there was no title left in the mother for them to acquire by inheritance at her death. The deed of Florence Schriver joined by her husband as that of a married woman would not operate on an after acquired title. *Wadkins v. Watson*, 86 Texas, 197. But her title had also passed by the guardian's sale and the question is not pertinent to the issue.

Since the defendants Call, Link and Rein bought with actual notice that Sue E. Baker had acquired the note and mortgage the question of the record thereof is not material, and the defendant Morrison having renewed the note and acknowledged the continuing security of the mortgage while he still owned the land, the question of the release of the mortgaged land as a surety does not arise.

The judgment of the court below in favor of the plaintiffs for the recovery of an undivided one-half interest in the four tracts of land described therein will be reversed and judgment will be here rendered therefor in favor of the defendants. But the judgment in favor of Sue E. Baker is in all things affirmed.

*Reversed and rendered in part; affirmed in part.*

Writ of error refused.



D. W. DOOM ET AL. V. T. L. TAYLOR ET AL.

Decided March 18, 1904.

**1.—Limitation—Actual Possession—Statutory Right.**

One can recover, under a plea of limitation of ten years, only that portion of the land in controversy shown to have been actually occupied by him, or 160 acres, if his possession be less than that, by virtue of article 3344, Revised Statutes, where his possession is not under a deed or other written memorandum of title duly registered.

**2.—Statutory Construction—Written Memorandum—Deed—Registration.**

The requirement of the statute that, to entitle the party in possession of land to hold to the boundaries described in any written memorandum other than a deed under which he claims, such memorandum must be duly registered, applies also to deeds.

**3.—Possession—Deed.**

Possession, under the ten years statute of limitation, by construction, to the limits claimed in the deed under which it is held, ceased when the title passed from the possessor by execution sale, and thenceforth his possession was limited to the part actually occupied.

Appeal from the District Court of Jasper. Tried below before Hon. W. P. Nicks.

*D. W. Doom and H. C. Howell*, for appellants.

No brief on file for appellees.

PLEASANTS, ASSOCIATE JUSTICE.—This is an action of trespass to try title brought by the appellants against the appellees to recover the title and possession of a tract of 218 acres of land, a part of the Thomas Tanner league in Jasper County. The defendants answered by plea of not guilty and by special pleas of limitation of three and ten years. By supplemental petition plaintiffs pleaded the coverture of the plaintiffs, Mrs. Cora Odell, Mrs. Mary E. Eyers and Mrs. Hattie M. Hicks. The trial in the court below without a jury resulted in a judgment in favor of defendants for the land in controversy on their plea of limitation of ten years.

The trial court filed the following findings of fact which, with the modification of the tenth finding hereinafter stated, we adopt as our conclusions of fact: "1. It was admitted on the part of plaintiffs and defendants that there is a complete chain of title from the government down to William Taylor, and that both plaintiffs and defendants claim title under William Taylor as common source of title, and I find:

"2. That Bernard Weil obtained judgment in the District Court of Jasper County, Texas, against William Taylor on the 9th day of April, 1867, which was reformed by a judgment of said court on the 8th day of October, 1868.

"3. That the first execution was issued on said judgment as reformed on the 3d day of October, 1872, and levied on the land in con-



troversy on the 11th day of October, 1872, by the sheriff of Jasper County, Texas, and was sold by the sheriff of said county by virtue of said execution and levy on the 1st day of November, 1872, at which sale D. W. Doom and M. C. Moulton became the purchasers, and that said sheriff executed to said purchasers a deed for the land on the 9th day of October, 1872.

"4. That plaintiffs D. W. Doom and M. C. Moulton instituted suit against Harriet Taylor on the 9th day of June, 1875, and recovered judgment in said suit against Harriet Taylor on the 16th day of July, 1875, and that William Taylor was not a party to said suit.

"5. That Harriet Taylor was the tenant of William Taylor at the time of the institution of the suit and renditions of judgment.

"6. That M. C. Moulton died on the 9th day of November, 1882.

"7. That all the plaintiffs except D. W. Doom claim as the devisees of M. C. Moulton and Lowman G. Moulton.

"8. That William Taylor died on the — day of —, 1888.

"9. That the defendants are the children and heirs at law of William Taylor.

"10. That William Taylor had actual and continuous possession of the land in controversy from 1875 until his death, claiming under a deed, and that the defendants as his heirs have had actual and continuous possession of the land from the death of their ancestor, William Taylor, until 1894.

"11. It was admitted that D. W. Doom and M. C. Moulton have paid taxes on the land in controversy for each and every year since the date of their purchase in 1872 to the present time.

"12. That the deed from John R. Williams to William Taylor under which he claimed the land in controversy, was dated — day of —, 1857, and was not recorded until September 23, 1898, and the land described in said deed is the land described in plaintiff's petition and contains by actual measurement 218 acres.

"13. That the dwelling house of William Taylor was not on the tract of land in controversy, but on the adjoining tract, containing 490 acres.

"14. That plaintiff Mrs. Cora Odell was married to Edward V. Odell on December 3, 1873. That plaintiff Mary E. Ayers was married to Charles I. Ayers on the 24th day of May, 1874, and plaintiff Hattie M. Hicks was married to Arthur J. Hicks on July 31, 1889."

The undisputed evidence shows that neither the defendants nor their ancestor, William Taylor, were ever in actual possession of all of the land in controversy, and the tenth finding of fact, considered in connection with the twelfth and the undisputed evidence in the record, can only be sustained upon the theory adopted by the trial court that, under the other facts found, actual possession by William Taylor and the defendants to any part of the land amounted in law to possession to all



of the land included within the boundaries set out in the deed to William Taylor.

Under appropriate assignments of error appellants assail the judgment of the court below on the ground that upon the facts found the ten years statute of limitation was only available as a defense to appellants' claim to that portion of the land in controversy shown to have been in the actual possession of appellees, and the evidence failing to show with any certainty what portion of the land had been so occupied, judgment should have been rendered for appellants for the whole of said land.

In so far as the assignments raise the question of the right of appellees to recover, under their plea of limitation of ten years, that portion of the land not shown to have been actually occupied by them, they must be sustained. Appellees can not under their pleas of limitation hold the land not actually occupied by them because their possession was not under a deed or other written memorandum of title duly registered. The title of their ancestor William Taylor having been divested by the sheriff's sale to Doom and Moulton, his subsequent possession of a portion of the land can not be extended to the boundaries described in the deed under which he claimed prior to the sheriff's sale. The sale of the land having divested Taylor of his title and claim under said deed his subsequent possession was that of a trespasser, and as such he could only acquire title to the land actually occupied by him, or if his occupancy extended to less than 160 acres he could by virtue of the statute have his claim extended to include that amount of land. Rev. Stats., art. 3344; Voight v. Mackle, 71 Texas, 78.

Appellees are further prevented from holding to the boundaries of the deed to William Taylor for the reason that said deed was not recorded until long after the occupancy of the land by which appellees claim to have acquired the title had ceased.

We think the requirement of the statute, that to entitle the party in possession of land to hold to the boundaries described in any written memorandum other than a deed under which he claims such memorandum must be duly registered, applies also to deeds. The purpose of the statute in requiring the memorandum of title to be recorded is to give notice of the extent of the claim, and the propriety of requiring such notice is as obvious when the claim is under a deed as it is when such claim is under any other written memorandum. The construction of the statute which accords the possessor the right to hold to the boundaries of his deed, where he claims under a deed, when the statute by a literal construction would only give him the right to so hold where he claims under a written memorandum other than a deed, necessarily requires that in order for a claimant under a deed to secure the benefit of such claim the deed must have been duly registered.



Appellees being only entitled to recover that portion of the land actually occupied by them, or if the number of acres so occupied was less than 160 to recover not more than said amount, which should be sufficiently described to enable the court to render judgment therefor (*Giddings v. Fischer*, 8 Texas Ct. Rep., 623), the judgment of the court below is reversed and the cause remanded for a new trial.

*Reversed and remanded.*



ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY v.  
R. C. FORBIS.

Decided March 19, 1904.

**1.—Railroads—Venue—Connecting Lines.**

Plaintiff sued two Texas railroads in C. County, to which neither road extended, but to which a third road extended which was not sued nor alleged to be liable, and averred that the three roads connected and "formed a continuous line of railroad from C. County to Kansas City, Mo.," being the line over which plaintiff's cattle were shipped. Held, that the Act of 1899, page 214, providing that suit may be brought against any one or all of several railroad corporations in a county in which neither of such railroads extend or is operated, does not authorize suit to be brought against two railroad companies in a county in which neither of them extends or is operated, and that the defendants' plea of privilege to be sued in some other county should have been sustained.

**2.—Same—Venue Not Waived by Plea of Privilege.**

The question being one of venue and not jurisdiction, defendants could not be held amenable in C. County by virtue of having pleaded there their privilege to be sued in another county.

Appeal from the County Court of Childress. Tried below before Hon. W. B. Howard.

*Browning, Madden & Truelove*, for appellant.

*Hall & Houssels*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—It appears from the petition that plaintiff below resided in Dickens County; that appellant, one of the defendants, was a nonresident corporation, operating a line of railway between Woodard, Okla., and Kansas City, Mo., with an agent at El Paso, Texas; and that the other defendant, the Southern Kansas Railway Company of Texas, was a Texas corporation, operating a line of railway between Washburn, Texas, and Woodard, Okla., with an agent at Panhandle, Carson County, Texas. It further appears therefrom that the Fort Worth & Denver City Railway Company had an agent at Childress, Texas, and operated a line of railway between that point, via Giles, the origin of the cattle shipment in question, to Washburn, Texas. This company, however, was not sued, and no negligence was charged against it, but it was alleged that the other companies were partners, or that the foreign company owned and controlled the Texas corporation, and that the three formed "a continuous line of railroad from Childress, Texas, by way of Giles, Texas, to Kansas City, Mo."

The plea of privilege to be sued in some county other than Childress, filed by the Southern Kansas Railway Company of Texas and adopted by the Atchison, Topeka & Santa Fe, contained a denial of every fact that would have warranted the institution of this suit in that county.

It seems quite clear, therefore, that the court erred in overruling the



plea of privilege. There is nothing in the Act of 1899, page 214, to justify this ruling. In providing that "suit for loss or damages \* \* \* may be brought against any one or all of such railroad corporations \* \* \* in any county in which either (any) of such railroads extend(s) or is operated," the Legislature did not intend to authorize a suit to be brought, as was done in this instance, against two railway companies in a county in which the railroad of neither extends or is operated, that is, in a county where the railroad of a third carrier which is not sued or in any manner liable for the damages claimed extends or is operated. At least the case of Texas & P. Ry. Co. v. Lynch, 75 S. W. Rep., 486, so holds.

York v. State, 73 Texas, 651, and that line of cases, which are cited to sustain the ruling, are not in point. The question involved is one of venue, and not of jurisdiction. While, as held in the cases cited, a foreign corporation over which our courts can not obtain jurisdiction to render a personal judgment waives the jurisdictional defense by appearing in our courts for the sole purpose of urging that defense, such corporation is as much entitled to plead its privilege of being sued in the proper county as any other party defendant. St. Louis I. M. & S. Ry. Co. v. White, 1 Texas Law Journal, 613, 76 S. W. Rep., 947; Texas & P. Ry. Co. v. Edmisson, 52 S. W. Rep., 635. Indeed, this privilege presupposes that the party pleading it is amenable to the general jurisdiction of the court. The question is not whether the court has jurisdiction over the person of the defendant, but whether the court has jurisdiction, against the objection of such defendant, though duly cited, to try the issue in the county in which suit is brought.

The judgment against appellant is reversed, and the suit abated on its plea of privilege, without prejudice to appellee's right to bring a new suit against it, but the judgment in favor of the other defendant, not being appealed from, will not be disturbed.

*Reversed and dismissed in part and affirmed in part.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v.  
RICHARD GAINES, BY NEXT FRIEND.

Decided March 19, 1904.

1.—Carrier of Passengers—Assault by Conductor.

Evidence considered and held to warrant a recovery in the sum of \$1000 for an assault by a conductor on a boy who had entered the train with a ticket, but was supposed by the conductor to be stealing a ride.

Appeal from the District Court of Rockwall. Tried below before Hon. J. E. Dillard.

*T. S. Miller* and *W. C. Jones*, for appellant.

*Kearby, Kearby & Hudson*, for appellee.

RAINEY, CHIEF JUSTICE.—This is an action brought by J. C. Gaines as the father and next friend of Richard Gaines, who is alleged to be a minor, against appellant. Plaintiff alleges that on the 23d day of April, 1902, his said son Richard purchased a ticket at Rockwall station which entitled him to passage over appellant's line of railway from Rockwall to Dallas and return; that he went aboard of one of appellant's trains, and soon after it started the conductor in charge of said train came through the car upon which he was riding, collecting fares and taking up tickets from the passengers on said train, and while so engaged in collecting fares and taking up tickets, said conductor, without cause or provocation, made a violent and malicious assault upon said Richard Gaines by slapping and beating and bruising him, and that said conductor then and there, in the presence of a great many passengers, used abusive, slanderous and defamatory language to said Richard Gaines, all of which caused him great physical pain, mental anguish, humiliation and shame; and he prayed for damages in the sum of \$10,000.

Appellant answered by general demurrer and denial. On the trial the cause was submitted to a jury, and resulted in a verdict and judgment for the plaintiff for \$1000, from which judgment the cause has been appealed and errors assigned.

*Conclusions of Fact.*—We adopt the testimony of Richard Gaines as our conclusions of fact. It is as follows: "I am the plaintiff in this suit. I got on the train here on the 23d of April, 1902, during the Confederate reunion at Dallas; I was going to Dallas; I remember very distinctly it was Wednesday, and I had a round-trip ticket to Dallas, and a whole lot of us boys that were going down there got on the other side of the train when it came in, as there was a big crowd there to get on, and I got on about the third coach, and all those coaches were full, and there was a conductor at both ends of the train,



and I went on through hunting a seat, and when I got to the third coach from the end I saw that the last two coaches were not full, and the conductor came in the back door of the coach and I went in the front door, and went on in there, and Sid King was sitting there and he called me, and I kept walking but had my head turned back looking at Sid King, and this conductor grabbed me and asked me where in the hell I was going, and I told him I was going to sit down, and he says, 'No, you are not; you are trying to beat the railroad,' and I says 'No, I am not,' and I disputed his word; and he says 'Where is your ticket?' and I says, 'Here it is in my pocket.' I had it in a little pocket here because I didn't want to lose it, and I was trying to get it out, and he says 'Say, hurry up, you little devil, and get your ticket out,' and he kept cursing me, and says 'God damn, you little kids ride around here and are always trying to beat the railroad,' and I am not sure whether I called him a liar or not, but I think I did and he says 'Shut up your head, you little bastard, or I will slap your head off,' and I says 'Do it,' and he slapped me on the side of the head, and had his punch in his hand, and knocked me over in a seat, and in about two minutes I came to myself, and I walked out and sat down on the platform and thought I would go and tell my brother, but I didn't do it, because I thought there might be trouble, and I stayed there till I got to Rowlett, and when I got there, there was about thirteen coaches in the train, and I went on up to the front of the car, and when I got up there some boy had told my brother about it, and after I got past Fisher I started back down there and I met my brother coming out of the car with a knife in his hand, and some of them said he had been in there with that conductor, and that he, the conductor, wouldn't fight anything. I remember that all this occurred on the 23d day of April, on Wednesday; we had just passed the railroad bridge; Harry's switch, I guess, is about three miles from Rockwall. The reason I left the car after the conductor struck me was because I didn't want to stay in there where he was because I was humiliated and embarrassed by his treatment. I was kind o' embarrassed; he had hit me and I didn't want to stay in there; I had a headache all day from being hit by him.

"The lick left the print of his hand on my face, and some of the boys noticed it, and I felt it all day; I didn't feel like doing anything all that day. When the conductor hit me he knocked me over in the seat, and I didn't have my senses for about two minutes, and I walked out of the car because I didn't want to stay in there; some of these other boys were in that coach beside me, and there was about fifteen or twenty people in there, not a very large crowd; after he hit me I walked on out, and I was going to sit down by that King boy, but walked past him and walked on out on the platform, and stayed there till we got to Rowlett, and then I went on to the front of the train. I am 17 years old now, and was 16 at the time this occurred; I was not as large then as I am now. I did not attempt to strike this con-



ductor, and offered no resistance at all to him, either before or after he struck me; I told him to let me alone, that I was a kid and he was a man; he was a pretty well-made man; I have seen him here, and he was in the courtroom awhile ago when I was sworn. I had a round-trip ticket that day; I bought it from the agent of the defendant here in Rockwall; I believe I paid a dollar for it.

"At the time of this assault by the conductor I had on short pants; I have been wearing long pants since Christmas; on that day I had on a tight coat, and had put my ticket in this pocket to keep from losing it, and I was getting it and the conductor kept cursing me, and I told him not to, that I was nothing but a kid. There were plenty of seats in those two last cars. After the conductor hit me I rode out on the platform."

It is insisted that the judgment is excessive. The facts support the verdict, and the judgment is affirmed.

*Affirmed.*

Writ of error refused.



FIDELITY AND CASUALTY COMPANY v. LONE OAK COTTON  
OIL AND GIN COMPANY.

Decided March 19, 1904.

**Insurance—Employers' Liability Policy—Employee Within Scope of Duty.**

An employer's liability policy issued by a casualty insurance company to a cotton oil and gin company indemnifies the latter against loss from liability for damages on account of bodily injuries, fatal or otherwise, suffered by any employee of the assured while on duty within the factory, shop or yards, in or during the operation of the business of the assured. Held to cover liability for injury to a carpenter in the regular employ of the assured, received while removing some scaffolding that was no longer necessary after the plant had been installed and put in operation.

Appeal from the District Court of Hunt. Tried below before Hon. H. C. Connor.

*Etheridge & Baker*, for appellant.

*Looney & Clark*, for appellee.

RAINEY, CHIEF JUSTICE.—On August 13, 1902, appellee sued appellant in the District Court of Hunt County for the recovery of \$2247.80 upon an employer's liability policy issued by appellant to appellee, indemnifying appellee "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy, by any employe or employes of the said assured, while on duty within the factory, shop or yards mentioned in the schedule hereafter given, or upon the ways immediately adjacent thereto provided for the use of such employes or the public, in and during the operation of the trade or business described in said schedule."

The said schedule referred to by that portion of the policy above quoted is as follows:

Under the head of trade or kinds of business: "Manufacturing cotton seed oil, including refining and cotton ginning."

Under head of location of plant: "Lone Oak, Texas."

Appellee alleged that on October 28, 1901, it had in its employ one R. L. Elliott, who was engaged in its business of manufacturing cotton seed oil, including refining and cotton ginning, and that while so employed the said Elliott was killed, and that by reason thereof his surviving wife and children recovered against appellee, in the District Court of Hunt County, a judgment for \$2150, and \$97.80 costs of suit, and that appellee had discharged said judgment, and that by reason of said policy appellant became liable in the amounts so expended by it in satisfaction of said judgment.

In addition to the general issue, appellant specially pleaded that said R. L. Elliott was not, at the time of his death, on duty within the factory, shops or yards of appellee, at Lone Oak, and mentioned in the



said schedule, made a part of said policy, nor while upon the ways immediately adjacent thereto, provided for the use of such employes or the public; nor while in and during the operation of the trade of refining and cotton ginning, being the business described in said schedule.

A trial before the court without a jury on April 8, 1903, resulted in a judgment in favor of appellee, and against appellant in the sum of \$2337.65 and all costs of suit. From said judgment appellant duly perfected its appeal, and now here prosecutes the same.

The evidence shows that during 1901 appellee constructed a plant for ginning cotton, manufacturing cotton seed oil, etc. The construction was completed about October 1st, and the machinery was installed by the 25th of October, which completed the plant, and complete operations began, though part of the plant had been in operation since September 1st. R. L. Elliott had been employed in the construction of the plant and in installing the machinery. On October 28th, while removing some scaffolding which had been erected in a lower room of the tower, the water tank crushed through, and Elliott was killed. He was a carpenter, and a few days before his death he had been placed on appellee's list of operatives, a carpenter being necessary in the operation of the plant. His duties were to assist the superintendent in regulating the machinery and to make any changes or repairs that were necessary during the operation. This was particularly necessary at that time, as the mill was new and there were new men to break in. The water tank rested on top of the tower. It was to supply the water for the machinery and fire protection and other things, and was necessary in the operation of the plant. The tower was three stories high. The first story is where the screw in the press operates, and also to store plunder in. The second story was the lint press room. This press was not to press ginned cotton, but the lint that comes off of the cotton seed already ginned. The press used for pressing ginned cotton coming from the cotton gin had been in operation since September 1st. The machinery in the press room in this tower had been installed three or four days prior to Elliott's death. On the day of the accident they were not making oil. The machinery was being operated to fill the water tank. The scaffolding that Elliott was removing had been put in during the installation of the press, and it was needful to take it down, as it was in the way.

The sole question for determination is, whether or not Elliott, at the time he was killed, was pursuing any occupation or business covered by the policy or described in the schedule made a part thereof. The policy indemnifies "against loss from common law or statutory liability for damages on account of bodily injuries fatal or nonfatal, accidentally suffered within the period of this policy, by any employe or employes of the said assured while on duty within the factory, shop or yards mentioned in the schedule hereafter given or upon the ways immediately adjacent thereto provided for the use of such employes or



the public in and during the operation of the trade or business described in said schedule." The trade or business mentioned in said schedule is "manufacturing cotton seed oil, including refining and cotton ginning." The operations carried on are those usual to the trade or business described.

The policy also stipulated that the company shall not be liable "for any injury to or caused by any person unless his wages are included in the estimated wages," set forth in the policy, upon which the amount of the premium paid was based; and unless "he is on duty at the time of the accident in an occupation described" at the place mentioned. The policy does not cover the making of additions to or alterations in any building, but does permit "ordinary repairs."

Construing the terms of the policy most favorably to the assured of which the language is susceptible, we are of the opinion that the death of Elliott comes within its provisions. The construction of the plant was finished. It was in complete operation, and Elliott had been transferred to the operating list and his wages "included in the estimated wages" set forth in the policy. He was employed as a carpenter, which is necessary in the operation of the plant, and he was on duty engaged in a work in the time needful in the operation of the plant. *Hoven v. Assurance Corporation*, 67 N. W. Rep., 46.

The judgment is affirmed.

*Affirmed.*



## TRAVIS F. JONES ET AL. V. A. G. ROBB.

Decided March 21, 1904.

**1.—Trespass to Try Title—Joint Owners—Legal Title.**

A suit for the recovery of land is properly brought by a joint owner in whom the legal title is vested, and without the joinder of a co-owner having an equitable title only.

**2.—Same—Authority to Bring Suit.**

Evidence held not to show that a suit brought in 1866 in the name of the owner was brought without his authority.

**3.—Lis Pendens—Delay in Prosecuting Suit.**

What lapse of time would amount to negligence sufficient to defeat the force of the suit as a pending action is a question to be determined with reference to the circumstances of each particular case, and under circumstances here considered is held not sufficient.

**4.—Same—Change of Venue—Evidence.**

In view of a lapse of thirty-eight years, death of the parties interested in the transaction, and the almost total destruction of all the records bearing on the question, the testimony of a witness, as to declarations made at the time, was admissible to establish the bringing of a suit in a certain county and its transfer to another, and the presumption will be entertained that it was regularly made.

**5.—Same.**

By agreeing to a change of venue and thereby consenting to the removal of all the papers in a case, a litigant does not lose the right to invoke the rule of lis pendens.

**6.—Lis Pendens—Judgment—Parol Evidence.**

The papers in a suit having been destroyed, parol evidence was admissible to show that a judgment in favor of an intervener and against the claim asserted by a defendant was recovered by such intervener by agreement and in the interest of such defendant, and to explain thereby the effect of such judgment on the rights of a purchaser pendente lite.

**7.—Same—Agreed Judgment.**

A purchaser pendente lite is bound by the judgment subsequently rendered therein, though it was by agreement, unless collusive and invoked by one who was a party to or chargeable with notice of the collusion.

Appeal from the District Court of Harris. Tried below before Hon. Norman G. Kittrell.

*Masterson, Morris & Masterson*, for appellants.

*Bullitt & Louis, Spotts & Matthews, L. A. Carlton, Greer, Greer & Nall*, and *Greer & Minor*, for appellee.

GILL, ASSOCIATE JUSTICE.—This is an action of trespass to try title instituted by the appellants to recover of appellee the land described in the petition. The appellants claim an interest in the land as heirs and devisees of their ancestor, Josiah Taylor. The appellant W. J. Taylor claims an interest therein as a devisee of his mother, Carrie V. Taylor, surviving wife of Josiah Taylor. The appellee claimed the entire tract in controversy under three distinct chains of title: (1) Through a sale of J. M. Brandon as independent executor of the will of Josiah Taylor, deceased. (2) Through deeds from and under Charles L. Cleveland. (3) Through deeds from the heirs of W. T. Austin ex-



ecuted to one Lewis in satisfaction of a mortgage executed by W. T. Austin.

The appellants assail the deed from Brandon as executor under which appellee claims on the ground (a) of want of power in the executor to convey; (b) because made to a coexecutor, and (c) conceding the power to convey the decedent's interest he could not convey the community interest of Carrie V. Taylor, the surviving wife of Josiah Taylor.

To the appellant's prayer for title notwithstanding the deed from Brandon as executor the appellee pleaded stale demand and limitation of four years.

Such other contentions as are necessary to be considered in determining this appeal will be set out in their proper connection further on in this opinion.

A trial before the court without a jury resulted in a judgment for appellee. The facts are as follows:

In January, 1866, John P. Austin purchased 1000 acres of land out of the northern portion of the Stephen Jackson league in Hardin County. By this deed he in fact acquired only a three-fourths interest therein. Though the title was taken in his own name, his uncle W. T. Austin furnished half the money for its purchase and by an express prior agreement became the owner of an undivided half interest in the land thus acquired.

On the 16th day of February, 1866, Nathan Gilbert purchased this property from some of the heirs and surviving wife of Stephen Jackson, the original grantee. His deeds from the heirs were void, they being executed by married women and the certificates of acknowledgment being defective.

The Austins claim under a deed made by Stephen Jackson in his lifetime which appears to have effectively conveyed the interest of both himself and his wife.

In 1866 a suit was instituted in Hardin County in the name of John P. Austin against Nathan Gilbert for the recovery of this land. Nathan Gilbert voluntarily appeared therein, agreed to a change of venue to Liberty County, and thereafter died in July, 1866.

In August, 1866, Caroline A. Gilbert qualified as survivor of the community, but no further proceedings appear to have been had in the cause until February, 1870, when a judgment was rendered that John P. Austin recover the west 500 acres and Chas. L. Cleveland as intervener the east 500 acres of the 1000 acres then in controversy and that the Gilberts recover nothing, the costs being adjudged equally against Cleveland and Austin.

On December 31, 1866, John P. Austin sold and conveyed the entire land involved in that suit to W. T. Austin, who on the 22d of July, 1868, borrowed \$2237.80 from Josiah Taylor and executed his note therefor, together with a mortgage on an undivided one-fourth interest in the 1000 acre tract.



On October 28, 1869, W. T. Austin executed a deed to J. M. Brandon, executor of the will of Josiah Taylor (who had in the meantime died testate), in satisfaction and discharge of the debt and mortgage.

Taylor's death occurred in August, 1868, and his will was duly probated in September of that year. By the will J. M. Brandon, Emzy Taylor and Carrie V. Taylor, the surviving wife, were appointed independent executors and joined in the application for the probate of the will. The will providing that either of the executors might act alone, neither Mrs. Taylor nor Emzy Taylor took any part in handling the estate, this task being left entirely to J. M. Brandon. The latter on April 15, 1875, conveyed the land to Emzy Taylor for a recited consideration of \$4000 and an assumption on his part of certain costs incurred by the estate in certain litigation. Eleven years afterwards Emzy Taylor conveyed the land by deed of gift to Mrs. J. M. Brandon, his sister.

At the death of Josiah Taylor his estate consisted of community property of himself and wife, some separate property of his own, his wife being also the owner of some separate means.

That the mortgage by which the property in controversy was acquired was community property of Taylor and his wife is not questioned. Whether or not Josiah Taylor took the mortgage from W. T. Austin without actual notice of the pendency of the Austin-Gilbert suit is not made to affirmatively appear. The material portions of Josiah Taylor's will are as follows:

"Article 1. I will and bequeath to my three children, Euphrates, Florence Isabel, and Kate, each two thousand dollars gold. This bequest \* \* \* is intended to be as well in full discharge and satisfaction of any and all claim or demand which they or either of them have or make for a share or shares of community property of my first wife as well as her separate property if any she had.

"Article 2. I will and bequeath to my wife Carrie V. Taylor the homestead and lots upon which we are residing in the city of Galveston, together with all and singular the household and kitchen furniture and bedding, and also one horse and buggy.

"Article 3. I will and bequeath unto my son William and to each child that may hereafter be born of my wedlock each two thousand dollars gold. The estate of my wife Carrie V. Taylor to be subjected to the payment of this bequest. \* \* \*

"Article 4. I will that after the foregoing bequests are provided for the remainder of my estate to go to and be divided equally among all my children living and that may be born of my wedlock, and my wife Carrie V. Taylor, viz., the wife is to receive from that portion of my estate mentioned in this fourth article the same amount as one child receives, and in case of the death of either of my children the surviving child or children of such deceased take the share of such child or children's deceased parents per stirpes."



Article 6 imposes on the wife the maintenance and education of the minor children at her own expense and the care of their property without charge until they marry or leave her.

By article 7 she is appointed guardian of their persons and estates.

Article 8 appoints the three hereinbefore mentioned executors to act without bond and independent of the courts.

Article 9 is as follows: "My and either of my executors are expressly authorized and requested to sell at public or private sale on such terms as either of them deem proper any and all of my real estate not in the city of Galveston or to partition the same among the heirs without the intervention of a court.

"Article 10. I desire it to be distinctly understood\* that whatever separate property my wife \* \* \* may have at my death or whatever property may be in her name at my death shall remain and be held and enjoyed by her independent of the provision of this will and foregoing bequests."

The devisees mentioned in article 1 were children of the first wife of Josiah Taylor. W. J. or William Taylor (one of the appellants) was his only child by Carrie V. Taylor.

The property bequeathed to the wife in article 2 was community of Carrie V. Taylor and the testator.

The wife accepted under the will. She thereafter married F. A. Juny and thenceforth lived in Mississippi and Tennessee and died in 1897. By her will W. J. Taylor is the owner of whatever interest she may have had in the land at her death.

At the date of the deed from J. M. Brandon to Emzy Taylor all the bequests had been paid but the estate had not been partitioned among the devisees. It is not made to appear what disposition was made by the executor of the sum received for the conveyance. At the date of the conveyance the community debts had been paid.

Mrs. C. A. Brandon, who received a deed of gift to this land from Emzy Taylor, in 1886 by deed of part and power of attorney as to the remainder, conveyed the land to W. W. Cruse, who conveyed to T. J. Oliver and appellee holds by mesne conveyances from Oliver as an innocent purchaser for value without notice. The conveyance from Mrs. Brandon to Cruse was in her own name, her husband's name not appearing in the body of the instrument, but it was signed and duly acknowledged by both, the wife acknowledging as a married woman.

In disposing of the questions involved on this appeal we will take them up in what appears to be their logical order without reference to the order of their presentation in the brief. While the facts are involved and intricate it is apparent from a careful inspection that if Taylor or his executor were in the attitude of purchasers pendente lite in the acquisition of the land under the mortgage from Austin then the appellee's title under the judgment in favor of Cleveland in the suit of Austin v. Gilbert is paramount.



Appellants under their contention that the doctrine of *lis pendens* can not be successfully invoked against the title of the Taylor estate presents the following objections:

1. The suit was brought by some unauthorized person in the name of John P. Austin without his knowledge.

2. In allowing it to stand upon the docket until 1870 after Nathan Gilbert's death, without making his legal representatives parties or otherwise pressing the litigation, it lost its force as a pending suit.

3. It is apparent from the face of the judgment that the claim of the Gilberts did not prevail therein either in whole or in part, but half of the land was recovered by Charles L. Cleveland, who intervened therein and set up his claim long after the date of the mortgage and the conveyance by Austin to Brandon as executor.

4. The suit was not instituted nor the judgment rendered in Hardin County, where the land was situate.

5. If it was instituted in Hardin County the venue was changed by agreement to Liberty County, which destroyed its force as notice of *lis pendens*.

To an intelligent disposition of these questions and certain collateral questions presented in this connection a more minute statement of the facts is necessary.

Upon the issue of whether the suit was brought by one having authority to bring it, John P. Austin testified in substance that he and his uncle, W. T. Austin, owned the land jointly and had other joint interests in lands in Texas. That his uncle was a lawyer living in Houston and Galveston. That he, John P. Austin, did not authorize the suit and never knew of it, but the relations of blood and business between him and his uncle were very close and he considered his uncle authorized to sue for the land. That his uncle had general charge of their joint business, and he, John P. Austin, shortly thereafter left the State.

There was no evidence that W. T. Austin did not institute the suit and the judgment of the court recites the appearance of the parties. The suit pended for four years and no one appears to have contested the right of the party representing the plaintiff to maintain it. It is questioned for the first time in this suit.

The court records of both Hardin and Liberty counties were destroyed by fire, but the minutes containing the judgment in the case of Austin v. Gilbert were preserved, as also an index of the Hardin County District Court docket. All the papers in the cause were destroyed. All the parties to the transaction except John P. Austin are long since dead.

Appellee sought and was permitted to show by W. F. Gilbert, a son of Nathan Gilbert, that his father in 1866 bought the land involved in the Austin-Gilbert suit, and when he came home he stated he had made the purchase and expected to be sued for it. That thereafter he learned from his father that the suit had been instituted, and that he



being anxious for the matter to be settled voluntarily appeared and answered. He also agreed to a change of venue to Liberty County and the venue was so changed. Witness does not give the reasons for the change. These things must have occurred in 1866, as Nathan Gilbert died in July of that year.

The index of the docket of the Hardin County District Court shows a suit of John P. Austin v. Nathan Gilbert and witness testifies that his father had no other suit against him.

On February 17, 1870, witness' mother, having theretofore qualified as survivor of the community, voluntarily suggested the death of Nathan Gilbert and made herself a party defendant. On the next day the judgment hereinbefore mentioned was entered, whereby John P. Austin recovered of the other parties thereto the west 500 acres of the 1000 acres there in controversy and Chas. L. Cleveland recovered the east 500 acres. It was adjudged in terms that the claims of the other parties to the land decreed to Austin was "without right or foundation" and that the claim of the other parties to the land so adjudged to Cleveland was "without right or foundation." The costs were adjudged equally against Austin and Cleveland.

It was further shown by the witness Gilbert that Chas. L. Cleveland, an attorney of high repute at that time, had been employed by his father to represent him in the litigation. That upon his father's death he continued to represent his mother in the winding up of the estate. That it was upon his advice that she qualified as survivor and made herself a party defendant and that he was her attorney representing her when the judgment was rendered. That he had no claim to any part of the land except by reason of a contract for part of the recovery in payment for his legal services. That it was by agreement with Mrs. Gilbert that the judgment was taken in his name and that the recovery was in fact in Mrs. Gilbert's right. That shortly after and in pursuance of the agreement made prior to the rendition of the judgment witness and Cleveland partitioned the land so recovered, giving 250 acres to one of the Jackson heirs, who was setting up some claim; 125 acres to Mrs. Gilbert, Cleveland retaining the remaining 125 acres. (The land in controversy in the present suit is a part of the 125 acres so retained by Cleveland).

Appellants objected to the answer of the witness John P. Austin to the effect that because of the relations of blood and business between him and his uncle the latter was authorized to bring the suit, the objection being that the answer was a legal conclusion. We are of opinion that in view of his entire testimony the answer was admissible. W. T. Austin held the equitable title to a half interest and had charge of this and other joint interests of himself and nephew. The answer added nothing to the force of his other testimony. The trial being before the court the answer if erroneous was harmless. We think W. T. Austin under the circumstances stated had authority to bring the suit.



It is further objected that if it be conceded that W. T. Austin had the right to bring the suit there is no evidence that he did. We are of opinion that since it appears that a person interested in the land and having the right to bring suits to protect his joint holdings was in Texas at the time that a necessity for a suit arose and such a suit being actually brought, it devolved upon appellant to show that the suit was brought without authority, and there is no evidence that W. T. Austin did not authorize it. The suit was properly brought in the name of John P. Austin, the legal title being in him at the time. W. T. Austin being dead and the records destroyed, we do not think the fact that John P. Austin, the joint owner, had no knowledge of the suit is sufficient under the circumstances to establish its unauthorized maintenance by another. That the court and the other parties litigant were so imposed on is a surmise too improbable to be indulged after this lapse of time. This disposes of the first objection to the judgment.

The trial court found that the failure to press the suit between the years 1866 and 1870 was, in view of the disturbed condition existing at that time, not such negligence as to destroy the force of the action as a pending suit. We approve this as a complete answer to the second objection. What lapse of time would amount to negligence sufficient to defeat the force of the suit as a pending action is a question to be determined with reference to the circumstances of each particular case.

The confusion and disorganization existing in this State during the period in question was so universal and so well recognized as to call forth legislation suspending all statutes of limitation until March, 1870. The trial court properly took those facts into consideration in determining the issue of the negligence of the parties to that action in failing to press the suit to a conclusion at an earlier date.

The death of the party defendant did not abate the action, and there is good authority for the proposition that its force as a pending suit continues thereafter until lost by the laches of the litigants in failing to make new parties. Freeman on Judg., sec. 203.

The fourth and fifth objections to its effectiveness as *lis pendens* will be considered together with the objection to the evidence of the witness Gilbert upon the point.

In view of the lapse of time, the death of the parties at interest or taking part in the transactions, and the almost total destruction of all the records bearing upon the question, we think the evidence of W. F. Gilbert, as to declarations made by his father at the time, was admissible to establish the bringing of the suit in that county and its transfer to another. The witness' actual connection with the parties whose declarations he details, his actual participation in the partition accomplished by the execution of deeds by Cleveland, in connection with the further fact that nothing in the record reflects upon the truth of the declarations, but on the other hand is altogether consistent with them, render it safe to accept his statement as conclusive. Especially is this true in



view of the facts disclosed by the Hardin County index, the fact that the land was situate in Hardin County and that Nathan Gilbert was a resident of that county. After this lapse of time we think it ought to be presumed, even in the absence of Gilbert's testimony as to the agreement, that the venue was regularly changed to Liberty County. In the absence of opposing proof such proceedings are presumed to be regular. But upon this point appellants contend that by agreeing to the change of venue, and thereby consenting to the removal to another jurisdiction of all of the papers in the case which would have disclosed the nature and subject of the litigation, the right to invoke the rule of *lis pendens* was lost. In support of this contention two North Carolina cases are cited. *Arrington v. Arrington*, 114 N. C., 151; *Spencer v. Creedle*, 102 N. C., 102. We have not had access to the report of the case first cited, but in the part quoted in appellants' brief the court concedes that no authority has been found for the conclusion reached. The second case cited does not support the proposition, but discloses the fact that in that State there is a code provision for the filing of notice in counties other than that in which the litigation is pending.

In *Burton v. Shafer*, 7 Law. Rep. Ann., 812 (an Ohio case), the rule which unquestionably prevails in this State is announced, viz., that the suit in order to effect lands purchased during its pendency must be brought in the county where the land is situate.

We think the broad rule announced in *Arrington v. Arrington*, *supra* (if the opinion is quoted correctly), would be subversive of the policy upon which the doctrine rests. The general rule is that one buying land from a party who has put it in litigation in the county where it is situate must abide the result of the suit whether he becomes a party thereto or not. He, in effect, is charged with constructive notice of the pendency of the suit and its nature. A change of venue may become proper or necessary and is provided for by law. It is certainly illogical to hold that by taking advantage of that provision a litigant must abandon some other right—that his judgment will be thereby rendered less effective.

It seems to us more logical to hold that purchasers must be held to know that a change of venue may become a part of the history of any litigation, and so knowing must govern themselves accordingly. In this case the facts inducing the agreement and the change are not disclosed. No witness knows why it was done, and the order making the change is destroyed. We think after this lapse of time it ought to be presumed that the change was lawfully and regularly made.

In *Punchard v. Delk*, 55 Texas, 304, same case, 64 Texas, 360, it is held that a purchaser *pendente lite* is bound by the agreements made by his vendor in the course of the litigation. The change of venue in question here was made prior to the sales *pendente lite*.

We thus reach the third objection to this judgment as notice of *lis pendens*. As stated above the judgment expressly awards the part of the



land in controversy to C. L. Cleveland upon an intervention filed the day before the judgment and long after the date of the sales in question in this connection. That those claiming under Cleveland can not invoke the litigation for their protection unless Cleveland recovered by virtue of the right of Nathan Gilbert goes without saying. To avoid the force of this rule appellee adduced the evidence set out above to show that while the judgment was *prima facie* for his benefit to the exclusion of the Gilbert claim, it was in truth rendered thus in pursuance of an agreement between the defendant Mrs. Gilbert and the intervener. We have no doubt of the truth of the evidence or its sufficiency to establish that the Gilbert claim which had been present in the litigation from its inception was the basis of Cleveland's claim. That a reputable attorney would have intervened in a cause against the interest of his client while continuing to represent her, secure a judgment wholly defeating her, is inconceivable. That a respectable court would permit such a practice is equally beyond belief. It is shown in addition that Cleveland had no other claim, and soon after the rendition of the judgment recognized the interest of the Gilberts and of one of the Jackson heirs whose adverse claim doubtless induced the parties to give the judgment its form, to the end that a trusted and disinterested party might partition the property with reference to the trusts imposed by the prior agreement.

The point most strongly urged is that parol evidence is inadmissible to explain or vary the judgment.

A careful inspection of the judgment discloses that it is not necessarily inconsistent with the oral agreement shown. Such a judgment might properly have been rendered had Cleveland bought out the Gilbert claim and intervened in the suit.

The recital to the effect that the claim of John P. Austin and Mrs. Gilbert against the 500 acres adjudged to Cleveland is without right or foundation would be no less true if she had deeded him the land pending the suit. It seems to us that had the pleading of Cleveland been existent at the date of the trial in this cause and had shown that he prayed for judgment as the owner of the Gilbert claim it would have been clearly competent in explanation of the judgment. It follows that in the light of its loss the facts may be shown by parol. Freeman on Judg., sec. 273.

The evidence conclusively establishes that the Gilbert claim in fact prevailed to the extent of the 500 acres adjudged to Cleveland. In what way then can the form of the judgment affect the purchaser pendente lite?

It was not rendered when the rights were acquired, hence its recitals neither misled nor influenced him. It was the pending suit and the final prevalence in part of the Gilbert claim which is effective against him. With the private agreement between Cleveland and his client, Austin and his vendees had nothing to do.



In this connection it is further urged that it appears that the judgment awarding only part of the land to the plaintiff was an agreed judgment and that such a judgment will not bind a purchaser pendente lite. The judgment recites the appearance of the litigants and the hearing of proof, and it is not made to appear by parol or otherwise that it was rendered upon an agreement between plaintiff and his opposing litigants. But if this contention were true the rule could be enforced only between the parties or those having actual notice, and would not preclude a purchaser like appellee who bought for value without notice. Such a purchaser may safely take the recitals in the judgment at their face value. Such cases as *Wolf v. Butler*, 81 Texas, 86, illustrate the proper application of the rule that a compromise or collusive judgment can not affect a lis pendens purchaser. In that case the judgment was invoked by a party to the collusion, or at least chargeable with notice of it.

We are of opinion that appellee as the owner of the Cleveland title to the property in question rightfully recovered against the claimants of the Austin title whose ancestor was a purchaser pendente lite.

We do not decide the questions arising on the sale by the administrator as it is not necessary to the decision of the case. As required by law, we have found the facts upon every point in order that the parties may have the benefit of our fact conclusions in the further progress of this cause.

We are of opinion the judgment should be affirmed and it is so ordered.

*Affirmed.*

#### ON MOTION FOR REHEARING.

Counsel for the appellants in this cause have filed a strong motion for rehearing and it has received at our hands a most careful consideration. While we concede the force of appellants' contention and are aware the questions are by no means free from doubt, we are not prepared to recede from our first conclusion.

Because it is necessary to correct a few slight inaccuracies of statement we deem it proper to add the following to what has been said in the main opinion.

First, as to the corrections, we were in error in stating that W. F. Gilbert testified in terms that his father appeared and *answered* in the suit before the change of venue from Hardin to Liberty County. We assumed that the witness' statement that he agreed to a change of venue included an appearance and answer. We are still of opinion that it included an appearance, and whether it also included an answer is not material to our conclusion. Voluntary appearance is equivalent to per-



sonal service. 21 Enc. of Law, 611; Hanrick v. Gurley, 93 Texas, 458. The statement that Nathan Gilbert resided in Hardin County at the time of the institution of the suit is also inaccurate. He resided at the time in Jefferson County.

Our statement that John P. Austin testified that his uncle, W. T. Austin, had general charge of their joint business is misleading, as he was not specifically placed in general charge until after the institution of the suit. We still believe, however, that the testimony of the witness in its entirety supports the conclusion that W. T. Austin, by reason of the business relations existing between him and John P. Austin and the mutuality of interest in this and other property, had authority to bring the suit.

We stated in the main opinion that W. F. Gilbert testified that his father had no other suit against him. We should have stated that the witness said he knew of no other suit against his father and that he had no other landed claim. In this connection we are impressed with the force of the facts upon which we predicated our conclusion that the suit was originally brought in Hardin County. The land was situated there and the law placed the venue of the suit there. Nothing appears to indicate that it was instituted elsewhere by consent, but consent to a change of venue is affirmatively shown. Appellant contends that the Hardin County index, even taken in connection with the witness' statement that his father had no other landed interest, is without force, because the index fails to disclose the nature of the suit and it may have been some personal action against his father. Ordinarily the venue of a personal action against Nathan Gilbert would have been in Jefferson County, where he resided. It is as improbable that a personal action would have been brought elsewhere as that the action for the land would have been brought elsewhere than in the county where the land lay. Further than as stated the record is silent upon these points. There is no opposing proof, and in view of the destruction of the records there is no reason why the inferences indulged should not comport with known probabilities. The record proof by which the facts might have been disclosed has been destroyed. The witness testified that upon his father's death he became the practical head of the family and assisted his mother in managing the business of the estate. He became cognizant of the suit and its history through declarations by his mother and Cleveland during the subsequent progress of that cause made in connection with the acts and preparation with reference to it, and actually participated in the division of the proceeds of the litigation. To deny to appellee the force and effectiveness of these facts would be to hold that the destroyed records could not be supplied by facts and circumstances.

In this connection appellants complain that the court erred in permitting the witness Gilbert to testify, over objection, to the hearsay declarations of his father to the effect that he had been sued for the land



in Hardin County and that he had consented to a change of venue. While in discussing the force of the proof and its sufficiency to sustain the court's finding we expressed the opinion that it was admissible, we did not develop the point because it was not up for decision.

The third assignment of error as interpreted by the first proposition presents the question whether the suit in Liberty County was *lis pendens* as to land in Hardin County. The second and last proposition under that assignment presents the contention that the change of venue by agreement destroyed its force as *lis pendens*. Nor is the point made anywhere else in the brief. Our opinion that it was admissible was based on the rule allowing declarations against interest and in derogation of title to be shown, the declarant being dead and the issue not being susceptible of proof otherwise. 1 Greenl. on Ev., sec. 109; 1 Wharton on Ev., sec. 226. But if the hearsay should have been excluded we are inclined to think that the facts not subject to objection on this ground were sufficient to establish the bringing of the suit in Hardin County. If this is sound then a regular change of venue would be presumed, which would include the presumption that the defendant had first been duly served or had entered an appearance. The proceedings of courts must be presumed to be regular until the contrary is shown. Wharton on Ev., sec. 1302, et seq.

Appellants press their contention that the change of venue by agreement destroyed the force of the suit as *lis pendens* in Hardin County. We have examined the case of *Arrington v. Arrington*, 19 S. E. Rep., 394, in connection with the other North Carolina case cited on the same point. The opinions disclose that in that State the law requires a notice of the filing of a suit to be prepared and filed in order to affect property by notice *lis pendens*, and it is expressly declared that the statute takes the place of the common law rule. While other expressions in the opinion sustain the contention of the appellants, we are still of opinion that those cases ought not to control the decision of the question before us.

The fact that there was no statute in force in this State at the date of the change of venue under which the court could be required to order a change except upon the ground that he was disqualified to try it does not alter the situation.

In *Gillespie v. Redmond*, 13 Texas, 9, the change of venue was by agreement. In *Burnley v. Cook*, 13 Texas, 586, the change of venue by agreement was upheld, it being ruled that the question of the right of the court to which it had been transferred to try the suit was not one of jurisdiction but of venue. In *Rogers v. Watrous*, 8 Texas, 62, and *Taylor v. Williams*, 26 Texas, 586, it is apparently held that a court to which a case has been wrongfully sent by change of venue has no jurisdiction to try it. But it is plain from a careful inspection of the opinions that no more was held than that a change of venue would not be upheld over a party's objection unless the facts authorized the change under the law.



The term jurisdiction was manifestly used in the sense in which it is applied to the right of a court over a person in a county other than that of his residence.

It follows, then, that the venue was changed, not by force of the law, yet lawfully nevertheless, by the action of the parties and the order of the court. Had not the records of the court been burned the same evidences of the nature and character of the action would have remained upon the records of the Hardin County District Court as if the venue had been changed by force of a law authorizing it and over the objection of one of the parties. It seems to us if the force of the suit as *lis pendens* would be preserved in the one case there is no sound reason why it should not remain in force in the other.

Appellants complain because we did not specifically pass on the fourth assignment, by which is sought to be questioned the admissibility of the testimony of the witness W. F. Gilbert to the effect that his father had agreed with Cleveland to give him a half interest in the land as a fee. The assignment is not followed by a proposition and the question is not otherwise made in the brief. We are unable to perceive, however, why the declarations of Cleveland as to the source and character of his title (being so manifestly against interest) is not admissible under well settled principles of law laid down by Mr. Wharton and Mr. Greenleaf cited above.

On the question of the admissibility of parol evidence to disclose the right in which the Cleveland recovery was had, we do not deem it necessary to add anything to what was said in the main opinion.

Appellants complain of our failure to find that Josiah Taylor was a bona fide mortgagee for value without actual notice of the pending suit. The proposition is advanced that because the appellee is claiming under the Taylor mortgage the recitals in the mortgage of a valuable consideration paid bind him, and proof of payment of a valuable and adequate consideration authorizes the inference that the mortgagee or purchaser was without actual notice of any claim superior to the right sought to be purchased or acquired. The doctrine is perhaps sound as to appellee's claim under the estate of Taylor, but he also claims an independent title, and the latter is the one upheld by this court against the Taylor title. To such a state of facts it seems to us the doctrine that the recital in the mortgage of a paid consideration is evidence of the fact does not apply. But however that may be, the question is one of legal-inference rather than of fact, and it does not devolve on us to find one way or another upon the point. We have treated Taylor as a purchaser for value without actual notice.

Our holding that the suit was prosecuted with sufficient diligence between the death of Nathan Gilbert and the final judgment is assailed. It is apparent that what we said as to the suspension of limitation from 1861 until 1870 was misunderstood by counsel for appellants. We did not mean that because of the suspension negligence on the part of the



parties to that suit in failing to diligently prosecute was excused. We merely mentioned the legislation as a fact evidencing the general recognition of the disturbed conditions existing in this State during the pendency of that suit.

We do not deem it necessary to protract this opinion by discussing the motion further. We are of opinion it should be overruled and it is so ordered.

*Overruled*

Writ of error refused.



R. P. BRIDGENS AND WIFE V. THOMAS M. WEST AND  
E. D. SKINNER.

Decided March 23, 1904.

**1.—Notice—Minor—Guardian—Limitation.**

A minor was charged with notice of facts disclosed by the record in a legal proceeding to which her guardian was a party, and can not avoid the subsequent running of limitation on plea of ignorance and concealment of such facts.

**2.—Limitation—Constructive Trust.**

A mere admission that one has received money lawfully due another does not establish against him such a continuing trust as would prevent the running of limitation.

Appeal from the District Court of McLennan. Tried below before Hon. Marshall Surratt.

*Lindsey & Smith*, for appellant.

*Boynton & Boynton*, for appellees.

FISHER, CHIEF JUSTICE.—This is an action by the appellants against the appellees for the sum of \$2000, and for such sums as the evidence may show that the defendants are owing to the plaintiffs. The appellants in their petition substantially allege that the appellant Pearl Bridgens, the wife of R. P. Bridgens, formerly Pearl Steele, was entitled to a distributive share of the estate of Thomas Steele, deceased, and that the appellees, as her representatives and agents, collected and received from the administrator of the estate of Thomas Steele, as her distributive share, the sum of \$2000, which they held in trust for her in their fiduciary capacity as agents, which sum, or any part thereof, has not been paid to her or accounted for; that she was a minor at the time the money was so received and collected for her; and, further, that by reason of an admission made by the appellees in a suit brought by the appellants against the administrator of the estate of Steele for her distributive share, they were estopped from denying that they received and collected the money and held the same for her, the admission consisting in a representation made to the court in which said action was pending that they, the appellees, had settled with the administrator, and received from him as the representatives of all the heirs and distributees the estate that they were entitled to, and that by reason of such representation and statement, the court in effect dismissed the appellants' suit against the administrator. Also that in the County Court upon the final settlement of the estate the appellees made a statement to the court to the effect that they had settled with the administrator in full as the representatives of the heirs and distributees of the estate; and the inference from the averments is that by reason of this representation the court



closed the administration and discharged the administrator. This representation is also alleged as an estoppel.

The appellees pleaded in defense that they did not represent the appellant in receiving any part of her estate from the administrator, and that they did not receive her portion; and also pleaded the statutes of limitation of two and four years.

It appears from the facts that the appellant Pearl Bridgens, who was formerly Pearl Steele, was entitled to a share of the estate of Thomas Steele, deceased, to what extent is not definitely shown by the evidence; that there was in 1878 an administration with the will annexed upon the estate of Thomas Steele, and that in November, 1878, the appellees recovered a judgment against Wallace, administrator of the estate of Steele, in the sum of \$5647, and that notice of appeal to the District Court of McLennan County was given, and it appears that the case was appealed to and docketed in that court. In 1893 Wallace, the administrator, made a motion to dismiss the appeal and strike the case from the docket, for the principal reason that the administrator had fully settled with the plaintiffs in that case.

The appellant Pearl Steele, in resisting this motion, filed a pleading to the effect that she was one of the distributees of the estate of Thomas Steele and was interested in the judgment recovered against the administrator by the plaintiffs in that case, who it appears from the record are the appellees here. She asked that the case be reinstated upon the docket, and in effect that she recover from the administrator her interest in the judgment obtained against him.

The appellant's motion to reinstate the case and retain it on the docket was denied by the court, from which judgment she gave notice of appeal, but it does not appear that the same was prosecuted.

As evidence authorizing the court to enter the judgment that it did, the administrator introduced in evidence the following document signed by T. M. West and E. D. Skinner, the appellees in this suit: "We were parties interest and representing heirs of Thomas Steele, Sr., deceased, and after action on our complaint in the County Court of McLennan County against J. D. Wallace, administrator of said estate, and he had given notice of appeal to the District Court of McLennan County, we for ourselves and for the heirs of Thomas Steele, Sr., deceased, made a full, fair and final settlement with J. D. Wallace and one of his bondsmen, Peter McClelland, and it was then agreed that said appeal bond should be dismissed, and we supposed it had long since been done, as all the heirs were all satisfied with the settlement which was made in the latter part of 1878 or in the first part of 1879, and we have heard no complaint about the matters since. We are surprised to hear that the case is still on the docket. It is there improperly and you are authorized to dismiss it." This document was made an exhibit to the motion filed by the administrator to dismiss the case from the docket.



The judgment of the court in that case declining to reinstate and retain the case on the docket at the request of Pearl Steele was entered on June 19, 1894. On the 3d day of November, 1894, on the application of Wallace, the administrator, the court entered a judgment discharging him, and reciting therein that all the debts against the estate and all costs had been paid, and that the administrator during the years 1878 and 1879 had a full and complete settlement with the heirs of Thomas Steele, deceased, of all matters pertaining to the estate, and the administration thereof on his part, and that he had delivered to them and their representatives all property and effects belonging to said estate in his hands. Then follows the order discharging the administrator.

It appears as a part of the record in this latter proceeding that there was offered in evidence by the administrator the following document, signed by the appellees West and Skinner: "Know all men by these presents that we, T. M. West and E. D. Skinner, do hereby certify and acknowledge that we, for and in behalf of all the heirs and distributees of the estate of Thomas Steele, deceased, have received from J. D. Wallace, as administrator of said estate, the property and effects of said estate, and have had with said administrator a full and complete settlement of all matters pertaining to said estate, which settlement we had on or about the 18th day of December, 1878, and said estate should then have been closed, and we do hereby release said Wallace from all further liability on account of said estate as administrator, and consent that he may be discharged without further notice." This document was signed on the 20th of October, 1894.

Appellant Pearl Bridgens was a minor at the time of this alleged settlement and at the time of the proceedings had in the district and county courts, as above stated, and became 21 years of age in 1896, and married her husband, her coplaintiff, about a year thereafter. During the time that the proceedings were had in the District Court, as above stated, by her to retain the case against the administrator on the docket, and the time that the County Court entered the order discharging the administrator, her mother was the guardian of her estate. The appellant Pearl Bridgens testified in this case that she did not consent to the proceedings had in the District Court under her name to reinstate and retain the case on the docket of that court against said administrator; but the evidence in the record shows that that proceeding was in effect authorized by her mother; and the appellant Pearl Bridgens states in her evidence that she knew of the existence of some kind of proceedings, but did not know its nature, and that she was not consulted and advised about the same.

The evidence shows that the appellees did, in 1878 or 1879, receive from the administrator a part of the estate of Thomas Steele, if not all of it; but at that time they were not acting as the agents of Pearl Bridgens under any contract or agreement with her or anyone for her. And if they did receive any part of the estate to which she is entitled,



the evidence shows that they acted without authority from her, either expressed or implied. The only evidence of agency that arises from the facts is the admissions of statements made in the two documents quoted, as above set out, which were made many years after they received the estate from the administrator.

In view of the manner in which we dispose of the case, these are all the facts necessary to be stated.

The trial court peremptorily instructed a verdict in favor of the defendants, acting evidently upon the theory that the plaintiffs' cause of action was barred by limitation.

The appellees were strangers to Pearl Bridgens and mere interlopers when they received from the administrator such portion of the estate that she might have been entitled to. In receiving the same, they acted under no fiduciary relationship to her by virtue of a contract of agency. Therefore, the form of agency that arose was merely of the nature of a constructive trust, and the appellant could, if an action had been seasonably brought after notice that they had received her property, have held them accountable for the amount collected. After she had received notice that her property had gone into the hands of the appellees, an action at law would have immediately arisen in her favor for money had and received, but which in this case she was not required to institute or prosecute until she reached the age of 21, which was in 1896; and from the date of the filing of the original petition in this case, more than four years have elapsed since she became of age. She does not in her testimony deny the fact that she knew that the appellees had collected the money she was entitled to, or that they had pretended to represent her in receiving that money from the administrator; nor does she expressly deny the facts contained in the statement made by these appellees, which was used as evidence in disposing of the case in the District Court and in closing the administration, as before stated. But, upon the contrary, it is clear from the facts as stated, that she must be charged with notice of the statements made by the appellees, as contained in the two documents set out in the findings of fact. Her mother was practically her representative in the proceedings instituted under the name of Pearl Steele to reinstate and retain upon the docket of the District Court of McLennan County the case against the administrator. As a part of the proceedings in that case which was attached to the answer of the administrator which was filed in the case, was the statement by these appellees that they had received all the estate from the administrator as the representatives of all the heirs; and Pearl Bridgens, acting through her mother, who was the guardian of her estate, must be held a party to this action, and would be charged with notice of the pleadings upon which the judgment of that court was based. Furthermore, it appears, as before stated, that as a part of the proceedings that occurred in the County Court in closing the administration and discharging the administrator, was the written statement of



the appellees to the effect that they had settled with the administrator and received as the representatives of the distributees all of the estate which was in his possession.

The record of the court in that proceeding would be notice to the parties connected with it. The appellant Pearl Bridgens, then Pearl Steele, being in law a party in interest as one of the distributees of the estate, would be affected with notice of what the judgment there recites. The proceedings had in these two courts, as stated in the findings of fact, indicate that there was at that time no disposition upon the part of the appellees to conceal the fact that they had settled with the administrator and received the estate that the distributees were entitled to. Seemingly, they advertised this fact as publicly as possible, and in proceedings in which Pearl Bridgens was substantially a party. These disclosures were made in 1894, two years before Pearl Bridgens reached her majority; and she then must have known, or could have ascertained by proper inquiry, a knowledge of the fact that the appellees had admitted that they had collected her distributive share of the estate. *Parish v. Alston*, 65 Texas, 197. This case, in some of its features, is similar to the one under consideration; and in effect holds that one occupying the situation of the appellant to the proceeding discharging the administrator, would be chargeable with knowledge of the facts disclosed by the probate records.

Independent of the admission made by the appellees in the court proceedings, as stated, there is no evidence of any further admission of their liability, or that they had received property in trust for the appellant, Pearl Bridgens; and this case does not come within the rule of a continuing trust, where limitation would not operate against a constructive trustee just so long as he admits his liability or the existence of the relationship. A mere admission of the defendant that he received the money for the benefit of another, while sufficient to establish his liability, does not establish a continuing trust, unless that admission is kept alive by other admissions of like character, or by conduct recognizing his duty to perform the obligation that he has assumed. This doctrine is fully discussed in the well considered case of *Parks v. Satterthwaite*, 132 Ind., 413, where it is held that such a trust was merely constructive, and that limitation would commence to run from the time that the money was received, or at least from the time that the plaintiff knew that it was received. The cases cited, together with *Kennedy v. Baker*, 59 Texas, 150; *Tinnen v. Mebane*, 10 Texas, 246; *Allbrecht v. Allbrecht*, 35 S. W. Rep., 1076; *Mitchell v. McLemore*, 9 Texas, 152, and *Eborn v. Zimpelman*, 47 Texas, 516, are decisive of the questions raised in this case. These cases collectively establish the proposition that a trust of the nature shown by the facts in this case is merely constructive, and that a cause of action at law arises immediately upon receipt of the money by the assumed trustee, or as soon as the owner of the fund knows of its receipt, and that no demand is necessary.



The matter of estoppel pleaded by the plaintiffs does not change the form or nature of the trust. Before the occurrence of the facts from which the estoppel arose, the agency of the appellees was merely implied; or, to express it in another form, the trust was merely constructive. The admissions made by the appellees, from which it is claimed the estoppel springs, is merely a statement to the effect that they had received the funds from the administrator as the representatives of the heirs and distributees of the estate of Steele. They were not in fact the representatives of the plaintiff Pearl Bridgens, and this statement did not have the effect of making them express trustees—such a character of trust against which no limitation would run until there was a repudiation of the trust brought to the knowledge of the cestui que trust.

In view of the facts as stated, and the rules of law announced in the cases cited, plaintiff, at least at the time she reached her majority in 1896, had an adequate remedy at law against the appellees for the amount of money, if any, they had received from the administrator of the estate belonging to her; and it was not necessary that she should go into a court of equity in order to compel an accounting at the hands of the defendants. Therefore, we are of the opinion that the trial court was correct in peremptorily instructing the jury to return a verdict, because it is clear that the appellants' action was barred by limitation.

*Affirmed.*

Writ of error was refused by the Supreme Court, June 2, 1904.



## CHARLES GAMER v. J. T. THOMSON ET AL.

Decided March 23, 1904.

**1.—Unaccepted Draft.**

An unaccepted draft is no evidence of indebtedness against the drawee.

**2.—Same—Assignment of Debt—Plea of Privilege.**

An unaccepted draft, unless so framed as to constitute an assignment of the debt of drawee to drawer, does not have that effect; the drawee is not, then, a necessary or proper party to a suit on the draft, and may claim his privilege of being sued in the county of his residence, though joined as defendant with the drawer and indorsers who reside in the county where suit is brought.

Appeal from the County Court of Tom Green. Tried below before Hon. Milton Mays.

*K. C. Barkley and Hill & Lee*, for appellant.

*Jos. Spence, Jr., and T. C. Wynn*, for appellees.

KEY, ASSOCIATE JUSTICE.—On August 7, 1901, J. S. Miles drew a written draft on appellant and in favor of D. D. Wallace for \$128. Wallace indorsed the draft to the Concho National Bank, and the bank transferred it to J. T. Thomson. The draft was never accepted by appellant. Miles, Wallace and Thomson reside in Tom Green County and appellant resides in Tarrant County.

Thomson brought suit on the draft in Tom Green County, making Miles, Wallace and appellant defendants. Appellant interposed a plea to the jurisdiction of the court over him, asserting his privilege to be sued in Tarrant County. At the trial judgment was rendered for the plaintiff against all of the defendants, and the defendant Gamer has appealed.

We sustain the fifth assignment of error, which complains of the refusal of a special instruction, to the effect that the unaccepted draft was no evidence of indebtedness upon the part of the defendant Gamer.

We also sustain appellant's contention to the effect that his plea of privilege was well taken. In *House v. Kountze*, 17 Texas Civ. App., 402, it was held that the holder of an unaccepted bank check could not maintain an action thereon against the bank. That was the only point involved in that case; and while the authorities, as stated in the opinion, are in conflict, as the Supreme Court refused to grant a writ of error, we regard the case as settling the point in this State. The rule there announced was followed by this court in *Terry v. Dale*, 27 Texas Civ. App., 1, 65 S. W. Rep., 396. The decisions which support the case of *House v. Kountze* maintain that merely drawing and delivering a check or draft does not assign the debt or any portion thereof, and that until the drawee accepts he does not become liable to the payee named in the instrument. When the instrument is so framed as to assign any



portion of a debt or fund, the rule is different. *Harris County v. Campbell*, 68 Texas, 22; *Texas Builders' Supply Co. v. National Loan and Inv. Co.*, 22 Texas Civ. App., 349, 54 S. W. Rep., 1059. In this case, however, there is no room for such construction, and the rule announced in *House v. Kountze*, supra, must prevail. There is nothing in the record to indicate a verbal assignment of the debt, such as was shown in *Clark v. Gillespie*, 70 Texas, 516; and therefore, as the case is here presented, it must be held that appellant, not being liable on the draft, was neither a necessary nor a proper party.

For the error indicated, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



GULF, COLORADO & SANTA FE RAILWAY COMPANY v.  
J. F. DAVIS.

Decided March 23, 1904.

**1.—Master and Servant—Duty of Servant to Inspect Appliances—Assumed Risk—Charge.**

A servant is not required to exercise even ordinary care to discover defects, though patent, in appliances furnished by the master, but could assume that they were safe, and in acting upon such assumption assumed no risk unless he actually knew of such defects. Charge on assumed risk held correct.

**2.—Charge—Modification by Court.**

The court has authority to modify a charge asked by a party and give it to the jury without rewriting the whole charge.

**3.—General and Special Charges.**

There is no error in refusing special requested charges upon issues covered by the general charge.

**4.—Charge—Negligence—Proximate Cause.**

Charge upon negligence and proximate cause of injury to plaintiff caused by the breaking of a defective truck held correct when read in connection with other paragraphs of the charge.

**5.—Servant—Duty to Inspect Appliances.**

Evidence held not to show a duty of servant engaging in moving freight on a truck to inspect the appliances used by him.

Appeal from the District Court of Johnson. Tried below before Hon. Wm. Poindexter.

*J. W. Terry* and *A. H. Culwell*, for appellant.

*S. C. Padelford*, for appellee.

FLY, ASSOCIATE JUSTICE.—Appellee, in a trial before a jury, recovered the sum of \$3500 for personal injuries resulting from a defective truck that he was using in the roundhouse of appellant.

Appellee was employed by appellant as a cleaner and sweeper in its roundhouse in Cleburne, Texas. It was his duty to keep the roundhouse clean and to carry out material not in use and store it in a place provided for it. Things too heavy to be carried by hand were carried out on trucks provided by appellant for that purpose. On March 5, 1903, in pursuance of his duty, appellee proceeded to carry out some trestles that had been in use by workmen in repairing an engine tank. He got a truck, from among those furnished by appellant, and rolled it to the side of the trestle and inserted its iron toe under the trestle and caught hold of it with one hand and sought to pull it on the truck. The left hand corner of the truck, being fractured, gave way and the trestle fell and caused the handle of the truck to fly upward and strike appellee in his stomach and inflicted serious and permanent injury on him. The break in the toe-piece was an old one, but was not discovered by appellee. Had the truck been in proper repair the accident would not have occurred. The toe of the truck consists of pieces of iron extending from handles on the side in front of the wheels and is used to insert



under any object desired to be carried on the truck. Appellant's round-house foreman, under whom appellee worked, knew of the defect in the truck before it was used by appellee.

The duty of inspecting the appliances furnished by appellant did not devolve upon appellee. He could act upon the assumption that the tools furnished him by appellant were reasonably safe, and was not required to exercise ordinary care to discover whether they were safe or not. Unless he knew that the truck was defective he did not assume the risk attendant upon its use. *Texas & N. O. Ry. Co. v. Bingle*, 91 Texas, 287; *Missouri K. & T. Ry. Co. v. Hannig*, 91 Texas, 347. Appellee swore that he had no knowledge of the defect, and the jury were justified in finding that he did not know of it. The mere fact that the defect may have been open and patent did not charge appellee, as a matter of law, with knowledge of the defect. The jury might have concluded if the defect was open and visible that appellee knew of it, but they might also have concluded that he did not know of it. He was not charged with the exercise of even ordinary care in discovering defects in appliances furnished him by the master. He could act with perfect assurance that the appliances were safe. The opinion or conclusion of the foreman that appellee should have selected a good truck, did not indicate that any duty of inspection devolved upon him. The duties of his employment preclude the idea that he owed any duty of inspecting the tools and appliances of appellant.

The court did not err in modifying a charge on assumed risks asked by appellant, by adding thereto that appellee "did not assume risks caused by the negligence of the defendant company of which he was ignorant." A charge very similar in its terms was approved by this court in the case of the *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 Texas Civ. App., 324, and the decision met with the approval of the Supreme Court. In that case the trial court gave the following instruction: "One who enters the service of a railroad company assumes the risks ordinarily incident to the work, but he does not assume any risk arising by reason of the company's negligence, unless he knows it." That charge was approved by this court as stating generally, but correctly, the rule laid down by the Supreme Court in the *Hannig* case. Section 12 of the charge of the court was not objected to, and it embodies the same doctrine as that given in the modification of the special charge.

If appellee was ignorant of the defect in the toe-piece of the truck, he did not actually know of it, and neither was the defect so obvious and patent that he was charged with knowledge of it. Ignorance of the defect carried with it a lack of knowledge of any kind of the defect in the truck, and the modification of the charge requested by appellant merely made it conform to the rule announced in the *Engelhorn* case as well as decisions of the Supreme Court. *Bonnet v. Railway*, 89 Texas, 72; *Texas & N. O. Ry. Co. v. Bingle*, 91 Texas, 287.

There is no force in the contention that a trial court has no authority to modify a charge asked by a party, but must give it, if at all, in the



precise language requested. In support of this proposition the case of *Southern Cotton P. & M. Co. v. Bradley*, 52 Texas, 587, is cited and supports the contention, but in the case of *Missouri Pac. Ry. Co. v. Williams*, 75 Texas, 4, that doctrine is modified. The court in the latter case said: "In *Compress Company v. Bradley*, 52 Texas, 587, it is said that the judge should give or refuse a charge asked in the very terms of the request, and that if he wishes to give it with a qualification he should rewrite the instructions embodying the qualification. We think, however, that when a modification is appended to a requested charge in such a manner as to show the precise charge asked, and the precise modification, and the whole is intelligible to the jury, that no injury results to the party making the request."

Charges number 3, 6, 7 and 8, requested by appellant, were on the question of knowledge of the defects in the truck and assumption of the risk arising from its use. That issue had been presented in several forms in the charge and it was unnecessary to repeat it.

The seventh paragraph of the charge is as follows: "It was the duty of the defendant company to use ordinary care to furnish trucks to be used by the plaintiff in removing trestles from the roundhouse reasonably sufficient and safe for the purpose, and to use the same care to keep the same repaired and in a reasonably safe and sound condition, and if it failed to use such care, such failure would be negligence, and if plaintiff was injured as alleged and if such negligence of the defendant company was the proximate cause thereof, then plaintiff could recover." The ground of objection to the charge is that it permitted a recovery without reference to the knowledge appellant had of the defect in the truck. The charge is an absolutely correct proposition. If appellee knew of the defect in the truck the proximate cause of the injury was his negligence, and the jury could not, under subsequent charges, have found that the injury was the proximate result of the negligence of appellant. The criticised paragraph should be read in connection with and in the light of the ninth charge, in which it is stated that if appellee at the time he undertook to use the truck "knew of the broken and defective condition of the toe of said truck, if the same was broken or defective, or if in the discharge of his duties in the roundhouse, or in the course of his employment, you believe that he must necessarily have known of the broken and defective condition of said toe upon said truck, if the same was defective, and nevertheless undertook to use the same, then in either of said events you should find for the defendant and against the plaintiff, although you may believe that the toe upon said truck was broken and defective and that defendant was negligent in permitting and allowing same to become and remain in said condition, and although you may believe that plaintiff was injured and damaged as alleged." Proximate cause was defined in another paragraph.

The eighth paragraph of the charge correctly states a sound legal proposition. Under the evidence no duty of inspection rested upon appellee and he could assume that the truck was in good condition, and the



court did not err in so declaring. No matter what appellant's theory of the duties of inspection may have been, it was not supported by testimony and was properly disregarded by the court. The evidence relied upon by appellant to sustain its theory is that of Butler, who stated: "It is the duty of the man using the truck or machinery to see what character of truck or machinery he is getting. If he gets hold of a truck that is defective, there is nothing to prevent him getting another one." There is nothing in the evidence that tends to prove that it was the duty of appellee to inspect the trucks. It was merely a declaration of the witness that appellee was to use care in selecting the appliance to be used by him. If it made an inspector of appellee it converted every employe of the railroad company into an inspector for the same duty seems to rest upon all of them.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



## D. F. TIEMANN ET AL. V. HOWELL COBB ET AL.

Decided March 24, 1904.

**1.—Married Woman—Acknowledgment.**

A certificate of acknowledgment by a married woman showing that she "being by me examined, privily and apart from her husband, and having the foregoing instrument fully explained to her, acknowledged the same to be her own act and deed and that she did not wish to retract therefrom," is insufficient in failing to show acknowledgment that she had willingly signed the deed.

**2.—Trespass to Try Title—Common Source—Landlord and Tenant.**

Plaintiff in trespass to try title can recover, though failing to show title from the sovereign, on proof of title under conveyance from defendant and defendant's acceptance of a holding under him as his tenants.

**3.—Same—Pleading—Outstanding Title.**

Defendant who has plead specially title by conveyance from one whose rights plaintiff shows that he has by older conveyances, can not defeat plaintiff's recovery under his plea of the general issue by a superior outstanding title under which he does not show by his pleading that he claims.

Appeal from the District Court of Harris. Tried below before Hon. Chas. E. Ashe.

*Ira P. Jones*, for appellant.

*Fisher, Sears & Sherwood* and *C. S. Bradley*, for appellee.

GARRETT, CHIEF JUSTICE.—D. F. Tiemann and others brought this action of trespass to try title against Howell Cobb, Jesse Williams, Winnie Williams, Nelson Wright and W. S. Hunt for the recovery of certain land lying in the city of Houston. Wright made no appearance and Hunt disclaimed title. After the plaintiffs had introduced their evidence and the defendants having offered none, the court directed the jury to return a verdict for the defendants and judgment followed in their favor. Title to the land in controversy was shown by the evidence to have vested in Ella L. Withers, the wife of W. L. Withers. A deed from W. L. Withers and wife purporting to convey the land to John R. Harris was excluded by the court on account of a defective acknowledgment. Deeds from Harris in regular chain of transfer to D. F. Tiemann & Co. were admitted only for the purpose of showing an outstanding title not connected with Ella L. Withers. Proof of survivorship and heirship to plaintiffs of the firm of D. F. Tiemann & Co. was made. The deed to D. F. Tiemann & Co. was executed November 26, 1868. The defendants Jesse Williams and Winnie Williams executed a deed March 1, 1898, to Nelson Wright conveying the land in controversy to him. March 5, 1898, Nelson Wright conveyed to W. S. Hunt and on March 30, 1898, Hunt conveyed to the plaintiffs. On March 28, 1898, the defendants Jesse and Winnie Williams entered into a lease contract with the plaintiffs in which the premises in controversy were leased to these defendants for two years from that date. In said lease they acknowl-



edged plaintiffs as owners of the land and that they occupied the same as tenants of plaintiffs; and on same date executed to the plaintiffs a separate instrument by which they disclaimed title and acknowledged them as their landlords and that they had always held as plaintiffs' tenants. Howell Cobb in his answer pleaded not guilty and by cross-bill title to a part of the premises in controversy by deed from Nelson Wright dated November —, 1901.

In deraigning their title to the property in controversy the plaintiffs offered in evidence the deed from W. L. Withers and his wife, Ella L. Withers, to John R. Harris dated January 10, 1865, and recorded January 12, 1865, but it was objected to by the defendants on the ground that the acknowledgment of the wife, Ella Withers, was not in accordance with law. The objection was sustained and the deed excluded. In making his certificate the officer who took the acknowledgment certified that the wife "being by me examined privily and apart from her husband, and having the foregoing instrument fully explained to her, acknowledged the same to be her own act and deed and that she did not wish to retract therefrom." The objection urged and sustained was that the certificate failed to show that the said Ella L. Withers had declared that she had willingly signed the same and there were no words of equivalent import in the certificate. The form prescribed by the statute in force at the time the acknowledgment was taken, as it does now, required that the certificate should show that the wife had willingly signed the deed, but the statute provided that any certificate showing that the requisites of the law had been complied with should be as valid as the form prescribed. Pasch. Dig., art. 1003; Rev. Stats., art. 4621. According to the statute in force then it was necessary that (1) the wife should acknowledge the instrument to be her act and deed; (2) she should declare that she had freely and willingly signed and sealed it; and that (3) she wished not to retract. The prescribed form omitted the word "freely." It is not necessary that the certificate should do more than show a substantial compliance with the law, and in doing so the three requirements need not be separately certified but may be blended provided they all substantially appear. *Belcher v. Weaver*, 46 Texas, 293; *Mullins v. Weaver*, 57 Texas, 6. In certifying the acknowledgment of Ella L. Withers the officer stated that she acknowledged the same to be her own act and deed. It is contended that the word *own* as used in the certificate shows that the deed was freely and willingly signed. *Own* as an adjective means peculiar, proper, exclusive, particular, individual, private, and is indicative of possession. Cent. Dic., in verb "own." The use of the word does nothing more than indicate that the signing of the deed was the wife's act in compliance with the first requirement. It does not convey the idea that she had willingly signed. The certificate is not a sufficient compliance with the statute. In the case of *Wilson v. Simpson*, in which the certificate was held sufficient, the first and second requirements were blended and the word *own* used



but it was followed by the word *free*. 80 Texas, 279. By the exclusion of this deed the plaintiffs broke down in deraigning their title from the sovereignty of the soil. But the undisputed evidence shows that they also claim title by a regular chain of deeds from the defendants Jesse and Winnie Williams and that these defendants had accepted a lease from the plaintiffs and attorned to them as their tenants. By their deed to Nelson Wright the defendants Jesse and Winnie Williams divested themselves of whatever title they had, and the plaintiffs showed by the introduction of the deeds from Nelson Wright to Hunt and from Hunt to themselves that they had acquired such title. As tenants also Jesse and Winnie Williams could not deny the title of their landlords although the suit was for the title as well as the possession of the land, since they did not connect themselves with the title outstanding in Ella L. Withers. McKie v. Anderson 78 Texas, 209; Collins v. Davidson, 6 Texas Civ. App., 79. The title of Howell Cobb was junior to that of plaintiffs claiming under Nelson Wright as common source. A superior outstanding title was shown back of the common source, but it did not appear that the common source was asserting any title derived from Ella L. Withers. Gann v. Roberts, 74 S. W. Rep., 950, and authorities therein cited. Hence if the pleading of the defendant Howell Cobb was sufficient to show that he claimed a part of the land from Nelson Wright without the introduction of his deed, common source as to him would be established and it would appear that his title was junior to that of plaintiffs. In actions of trespass to try title, although the defendant under the plea of not guilty may give in evidence any lawful defense except limitation and is not required to plead his title specially, yet if he do so he will be confined to the evidence of title as pleaded. Railway v. Whitaker, 68 Texas, 630. Being confined to his title as pleaded, and it appearing from the answer that it is under common source with the plaintiffs and junior and inferior thereto, it was not necessary for the plaintiffs to put the deed in evidence to establish common source. It appearing from the undisputed evidence that the plaintiffs should have recovered judgment in the court below for the land in controversy, the judgment rendered by that court will be reversed and judgment will be here rendered in favor of plaintiffs.

*Reversed and rendered.*

#### ON MOTION FOR REHEARING.

GARRETT, CHIEF JUSTICE.—It was stated in the conclusions filed when this case was decided, that “The title of Howell Cobb was junior to that of plaintiffs claiming under Nelson Wright as common source. A superior outstanding title was shown back of common source, but it did not appear that the common source was asserting any title derived from Ella L. Withers.” We withdraw the conclusion as stated and substitute the following: “The title of Howell Cobb was junior



to that of plaintiffs claiming under Nelson Wright as common source. The title was shown to be in Ella Withers prior to the time the common source attempted to convey it, but there is no evidence to show that the common source did not hold under it." Unless it should be shown that common source, Nelson Wright, did not hold under Ella Withers, who it is claimed had the superior outstanding title, such outstanding title was not shown. As we understand it, in order to show a superior outstanding title back of common source it must be shown that common source did not claim under the title which is claimed to be the outstanding title. With this correction of the conclusions the motion for a rehearing is overruled.

*Overruled.*

Writ of error refused.



## THOMAS CRONIN V. L. H. STILL ET AL.

Decided March 24, 1904.

**1.—Building Contract—Extra Work.**

A charge to find for defendant on a claim of a building contractor for extra work, because the written contract provided that no such claim should be allowed unless done on written order and estimate of the architect, which were not had, was properly qualified by the further exception of the case of a ratification by the owner of the giving a verbal order therefor by the architect, if there was evidence of such ratification.

**2.—Charge—Evidence.**

Charge held erroneous because of absence of evidence of authority of agents making waiver for owner of a building of his claim for damages by delay of contractor in its construction or of the making of a final settlement between the parties, submitted to the jury as constituting defenses.

Appeal from the District Court of Anderson. Tried below before Hon John Young Gooch.

*Thos. B. Greenwood*, for appellant.

*Gould & Morris* and *P. W. Brown*, for appellees.

GARRETT, CHIEF JUSTICE.—L. H. Still as contractor and William and George D. Broyles as materialmen brought this suit to recover of Thos. Cronin a balance due upon a contract for the erection of a building. From a judgment in favor of the plaintiffs for the entire amount sued for, the defendant has appealed. The points in dispute are a claim by the contractor for \$140 for extra work and a claim by the owner for eighty-two days' delay at the rate of \$3 a day in the completion of the building by the time stipulated in the contract. There is a provision in the contract that "no payment shall be made for extra work, unless done upon the written order of the architect, which order shall state the nature and cost of the work, and state what extra time shall be allowed for completion of the whole work by reason of the change." The architect in charge of the work made the contract with Still for the extra work, but did not make a previous written order and estimate therefor, but gave a written order for the payment of the money after the work had been completed.

The first error complained of is the qualification made by the court of the charge requested by the defendant to find for the defendant because the uncontradicted evidence showed that there was no written order for the work, the qualification being that if the architect ordered the work verbally and not in writing and Cronin ratified his verbal order, then he would not be excused from paying for the value of the same because the order was not in writing. The assignment does not point out any error because it does not state that there was no evidence of ratification. If Cronin in fact ratified the verbal order for the extra work and accepted it he would be bound to pay for it. But the judgment



of the court below must be reversed for error in the special charge number 2 given at the request of the plaintiffs with respect to the occupancy of the house by Mrs. Naylor as a defense to the claim for demurrage upon two grounds. There was no evidence upon which to submit to the jury any understanding between Still and Cronin in person that if Still would let Mrs. Naylor occupy the house the defendant would not claim demurrage. The only evidence tending to show such an agreement was that the architect had promised Still if he would let Mrs. Naylor occupy the house while it was being finished demurrage would be waived, and that Mrs. Branagan acting for her father had authorized Mrs. Naylor to take possession. The charge also assumed that the architect Moad and Mrs. Branagan were the agents of the defendant Cronin to make the alleged agreement with respect to the occupancy of the building by Mrs. Naylor. This was at most a disputed fact. It was also error for the court to submit to the jury the question of a final settlement between the parties because the undisputed evidence showed that they did not reach a settlement, but that the defendant only offered to settle upon payment of \$100 demurrage, which Still refused to allow and brought suit. For the reasons given the judgment of the court below must be reversed and the cause remanded.

*Reversed and remanded.*



## JOHN H. BOLTON V. H. V. PRATHER AND WIFE.

Decided March 24, 1904.

**1.—Partnership—Corporation—Sale—Rescission.**

One buying shares of stock in a business on the representation and in the belief that it was an incorporated company, it not being such, did not become a partner in the business by holding such stock, nor so liable as a partner for the depreciation in the value of the business and property by mismanagement of those conducting it as to prevent his maintaining action to rescind the sale to him and recover back the amount paid on discovery of the facts, though owing to such depreciation he could not replace the seller in statu quo.

**2.—Discovering Facts—Negligence.**

Evidence held insufficient to show negligence by a purchaser of stock in a business in failing to sooner discover that it was a partnership instead of a corporation, as the seller represented it to be.

**3.—Harmless Error.**

Error in overruling exceptions to a pleading becomes immaterial where the issues raised by such pleading were not submitted to the jury.

Appeal from the District Court of Cherokee. Tried below before Hon. Tom C. Davis.

*E. C. Dickinson and Willson, Box & Watkins*, for appellant.

*Guinn, Norman & Guinn and Campbell & McMeans*, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellees brought this suit to rescind the contract of sale and recover back the purchase money paid by them for twenty-six shares of the capital stock of the Jacksonville Compress and Ice Company sold them by the appellant. The petition alleges as ground for rescission that plaintiffs were induced to purchase the stock by the representation of the defendant that the Jacksonville Compress and Ice Company, by whom the stock was issued, was a corporation duly organized and chartered under the law, and that said representation was false. The certificates of stock were tendered to the defendant and plaintiffs prayed for judgment rescinding the sale and for the recovery of the sum of \$2500 paid by them to the defendant for said stock.

The defendant answered by general demurrer and general denial, and specially pleaded that plaintiffs by the purchase of said stock became the owners as partners of the interest in the business and property of the Jacksonville Compress and Ice Company represented by said certificates of stock, and continuously asserted ownership thereof and participated in the management and control of the business and property of said company up to a short time before the filing of this suit; that by their participation in the management of the affairs of said company plaintiffs discovered, or by the use of due diligence might have discovered, the character of said association and been fully acquainted with all of its business affairs and property; that by their conduct as afore-



said plaintiffs have waived their right, if any they had, to a cancellation of said sale, and have affirmed the same. The answer further avers that under the management of plaintiffs and their associates the property of the company has greatly depreciated in value and has been charged with a large amount of indebtedness, and plaintiffs are not entitled to a rescission of said sale because the defendant can not be placed in statu quo.

Plaintiffs by supplemental petition prayed in the alternative for the recovery of \$2500 as damages for the alleged fraudulent misrepresentation of the defendant.

The trial in the court below by a jury resulted in a verdict and judgment in favor of the plaintiffs, rescinding the sale of the stock and for the recovery of the purchase money paid therefor by plaintiffs with legal interest from the date of such purchase.

The facts disclosed by the record are as follows: The Jacksonville Compress Company was organized and incorporated in 1896, and operated a cotton compress at Jacksonville until 1898. In 1898 the directors and stockholders of this company purchased an ice plant and agreed to organize a new corporation to be known as the Jacksonville Compress and Ice Company. In pursuance of this agreement the new company was organized and the directors of the compress company were continued in office as directors of the new company. The stock in the compress company was surrendered and canceled and in lieu thereof certificates of stock in the Jacksonville Compress and Ice Company were issued. The appellant Bolton was a director in the old company and continued in office after the reorganization. J. E. Fleager, who was an attorney and also a stockholder and director and the secretary and general manager for both companies, was employed to procure the charter for the new company. No charter for said company was ever obtained by Fleager, but the board of directors were ignorant of that fact, and the stock of the company was issued and its business conducted by them under the belief that it was an incorporated company. In June, 1901, appellees purchased twenty-six shares of stock in the Jacksonville Compress and Ice Company from the appellant and paid him therefor the sum of \$2500. Before appellees agreed to purchase the stock they were told by the appellant that the company was incorporated. They would not have bought the stock had they known that the company was not incorporated. Appellant after making the contract of sale assigned twenty-six shares of the stock held by him in said company to appellees and procured the issuance to them of a certificate for that amount of stock, which certificate he delivered to them and received therefor the \$2500 agreed to be paid. This certificate was issued under the seal of the company and purported to be a certificate of stock in an incorporated company. Neither of the appellees was present when the transfer of the stock was made and the certificate for same issued in their names. At the time they purchased this stock appellees resided at Palestine. They



moved to Jacksonville in June, 1902. They never had anything to do with the management or control of the Jacksonville Compress and Ice Company, and did not learn that it was not incorporated until February, 1903. As soon as they discovered this fact they demanded a rescission of the sale and the return of the money paid by them to the appellant, and upon his failure to comply with their demand they at once brought this suit. It is not shown that they ever received any dividends upon the stock or any benefit of any kind therefor during the time they held it, except that as stockholders they were furnished with ice by the company during the summer of 1902, neither the quantity nor value of which is shown. The business of the Jacksonville Compress and Ice Company was managed by a board of directors of which appellant was a member. The appellee H. V. Prather never attended a meeting of the directors and only attended one meeting of the stockholders. He talked a number of times with members of the board of directors about the business of the company and tried on several occasions to get a meeting of the stockholders but was never able to get a quorum present. When appellant sold the stock to appellees the business of the company was in a prosperous condition and the property of the company was worth \$40,000. At the time appellees demanded a rescission of the contract of sale the business and property of the company had greatly depreciated in value, and it was charged with a large indebtedness which was fraudulently created by its general manager, Fleager, who had absconded. If this indebtedness can be defeated it will be at considerable expense to the stockholders. The evidence shows that neither the appellant nor any of the directors or stockholders of the company other than Fleager knew before January, 1903, that a charter had not been obtained for the company.

It is unnecessary to consider appellant's assignments of error in detail. The theory of the case upon which a reversal is sought is that appellees, by their purchase of the stock, became members of the joint stock company or partnership known as the Jacksonville Compress and Ice Company and as such were responsible for all the acts of the partnership undertaking, and were therefore responsible for the mismanagement of the affairs of the company by which its business and property had been so depreciated in value; that by reason of said depreciation in the value of the property the defendant could not be placed in statu quo by a rescission of the contract of sale, and appellees for that reason have no right of rescission. It is further urged that appellees have lost their right to a rescission because of their failure to discover within a reasonable time that the company was unincorporated.

The appellant by appropriate request charges endeavored to have this theory of the case presented to the jury, and by appropriate assignments in this court challenge the ruling of the trial court in refusing to give the requested instructions. The proposition advanced by appellant, that appellees by their purchase of the stock in the Jacksonville Com-



press and Ice Company became partners with the other stockholders of that company in the business and property of the company, is not sound. It is true that if appellees after they discovered that the company was not incorporated had elected to hold the stock they would have become partners in the business conducted by said company and would have been the owners of the proportionate interest in the business and property of the company which the number of shares held by them bore to the whole number issued by the company, and it may be that as to third parties dealing with the company appellees became liable as partners by their purchase of the stock notwithstanding the fact that they had no such intention and supposed they were purchasing stock in a corporation, but upon no principle of law can they be held to be partners as to appellant. A partnership inter se can only be created by a direct understanding and agreement between the parties. The undisputed evidence shows that neither the appellant nor the appellees agreed or intended to become partners by the sale and purchase of said stock, but on the contrary it was the distinct understanding of both that no such relation would be created by the purchase of said stock by appellees.

Such being the facts appellant can not charge appellees with the responsibility as partners for the mismanagement of the affairs of the company which resulted in the depreciation of the value of the business and property of said company. The evidence shows that appellees never had possession, control or management of the property or business of the Jacksonville Compress and Ice Company, and never asserted any right to such possession, control or management, or any ownership in any of said property. They did not agree to purchase from appellant an interest in the property or business of said company, but proposed to buy shares of stock in a corporation which they and the appellant both supposed owned and conducted the property and business held and conducted in the name of the Jacksonville Compress and Ice Company.

We think that under these facts the principle invoked by appellant, that to entitle a purchaser of property to rescind the sale on the ground of misrepresentation by the seller as to the character of the property he must offer to return the property in like condition as when he secured it, can have no application. Appellees received nothing from appellant except a certificate of stock in a corporation which had no existence, and the property which was supposed to have been owned by said imaginary corporation remains in the possession and control of appellant and his associates, and appellees can not be held responsible for the depreciation in its value.

We do not think the evidence raises the issue of negligence on the part of appellees in not sooner discovering the fact that the Jacksonville Compress and Ice Company was not incorporated. There was nothing to put him upon inquiry as to this matter. He had been assured by appellant when he purchased the stock that the company was incorporated. The certificate of stock purported to have been issued by a



corporate company. The business of the company was conducted by a board of directors all of whom supposed that it was incorporated, and the evidence shows that it was not until January, 1903, and after the secretary and manager of the company had absconded, that the board of directors discovered that no charter had ever been obtained for said company. Appellees during the time they held the stock had no occasion to make an investigation as to whether the company was incorporated, it not being shown that the fact of its incorporation was ever questioned by anyone.

The assignments which complain of the action of the trial court in overruling defendant's exceptions to that portion of plaintiff's supplemental petition which sought to recover in the alternative damages for the fraud and misrepresentation of defendant, are without merit. The right of appellees to recover damages as claimed in said petition was not submitted to the jury by the charge of the court and the error, if any, in overruling said exceptions was harmless.

We are of opinion that the judgment of the court below should be affirmed, and it is so ordered.

*Affirmed.*

Writ of error refused.



## PLANTERS COMPRESS COMPANY v. J. D. HOWARD.

Decided March 26, 1904.

**1.—Landlord's Lien—Withdrawing Consent That Tenant Might Sell.**

In an action by a landlord against a purchaser from a tenant of cotton subject to the landlord's lien wherein there was evidence tending to show that, as part of the rental contract, it was agreed by plaintiff that the tenant might market and sell the cotton and pay the landlord his one-fourth rental in money, it was error for the charge to instruct the jury that plaintiff had the right in law to afterward revoke such consent and forbid the sale of the cotton without informing the defendant. A mere gratuitous consent might have been so withdrawn.

**2.—Same—Estoppel or Waiver of Lien.**

Evidence showing that defendant bought the cotton in ignorance of the fact that the seller was the tenant of plaintiff and of any consent on his part to the sale does not raise a question of estoppel as against the defendant, the question in the case being one of waiver or abandonment of the lien on the part of plaintiff.

Appeal from the County Court of Bosque. Tried below before Hon. B. J. Ward.

*Crane, Greer & Wharton*, for appellant.

*Lockett & Cureton and Robertson & Robertson*, for appellee.

SPEER, ASSOCIATE JUSTICE.—For cause of action, appellee, who was plaintiff below, sued appellant, alleging that his tenants, P. A. and A. J. Holt, had sold to appellant certain cotton upon which he had a landlord's lien to secure the sum of \$293 due him for supplies and advances made to his tenants to enable them to make a crop. The sales to appellant were alleged to have been made without appellee's consent and over his protest. The appellant answered, among other things, that by the terms of the rental contract between appellee and his tenants, the said tenants were to gather and market the cotton and turn over to him one-fourth of the proceeds as rents on the land; and further that appellee had ratified the sale of said cotton and was estopped to assert his lien as against appellant.

We think the assignment complaining of the special charge given at the instance of appellee should be sustained. The charge is as follows: "At the request of the plaintiff the court instructs you that if you find from the evidence that the plaintiff at one time consented for said Holts to sell cotton, he had the right in law to afterwards revoke such consent and forbid the sale of the cotton, without so informing the defendant, and any sales of cotton made by said Holts, or either of them, to defendant, after plaintiff had revoked such consent, would be unauthorized by plaintiff and without his consent." This, of course, was tantamount to a withdrawal from the jury of the consideration of the issue tendered by appellant, that it was a part of the rental contract



that the tenants should sell the cotton in open market. We think the evidence tended to raise this issue, and the court therefore was not justified in giving the charge quoted. It is undisputed that at the time of entering into the rental contract nothing was said as to the time and manner of paying the rents. The tenant testified to the effect that he went to see appellee after he had commenced picking cotton, and asked him what about the rent. Appellee, to use witness' language, "asked me what I had been doing heretofore, and I told him that I had been selling cotton and leaving the rent where I sold the cotton. \* \* \* He said to go ahead and do the best I could with it and pay him the one-fourth, that is to sell it and get as much as I could for it. He did not say anything about where to sell it, but said for me to bring him his rent. \* \* \* I did not pay Howard regularly the rent as I sold the cotton. I believe I paid him rent for four bales at one time, but Howard received the money several times; whenever I would bring him the money. He did not make any objections to my selling the cotton. I do not know why he did not object to it. It was the contract for me to sell it, and he never did object. He told me to sell it and do the best I could." True, this testimony is pointedly contradicted by appellee. And it is also true that before all the cotton had been sold appellee forbade his tenants removing or selling any more of the crop, and it is upon this testimony, we apprehend, the court gave the plaintiff's special charge. But we do not believe the charge announces a correct proposition of law. If it be true that the alleged agreement was made, as testified by the witness Holt, and that the same constituted a part of the rental contract, then we apprehend appellee would not have the absolute right to revoke or repudiate such agreement, as the charge in effect tells the jury. The mutual promises between the parties to such after-agreement might be sufficient to constitute a binding contract. It might be a mutual interpretation or making certain of the original contract in a particular upon which it was hitherto silent. *Gammel Book Co. v. McCarty*, decided by this court March 12, 1904.

Appellee insists that since appellant bought in ignorance of the fact that Holt was the tenant of appellee, and in ignorance of any alleged consent on the part of appellee to the sales, there is therefore no estoppel to assert the landlord's lien as against appellant, and authorities are cited in support of such contention. But we are of opinion that it is not a question of equitable estoppel, or estoppel in pais, but rather one of entire abandonment or waiver of the landlord's lien by appellee. See *Gilliam v. Smither*, 33 S. W. Rep., 984. It is also undisputed that appellee knowingly received from his tenants a part of the proceeds of the cotton sold to appellant. This fact itself tends to show a ratification by him of such sales. *McCollum v. Wood*, 33 S. W. Rep., 1087. Of course if appellee gratuitously offered to allow his tenant to



sell cotton upon which a landlord's lien existed in his favor, and such permission in no way constituted a part of the rental contract, then he would undoubtedly have the right to withdraw such authority at any time before the sale was actually consummated. But, as before stated, under the facts of this case we think the charge given was erroneous.

The judgment is therefore reversed and cause remanded for another trial.

*Reversed and remanded.*



## JAMES LOGUE ET AL. v. J. B. ATKESON ET AL.

Decided March 26, 1904.

**1.—Mortgage of School Land—Forfeiture—After-Acquired Title—Estoppel.**

L. and wife executed a deed of trust, with covenants of warranty, on a section of school land which had been purchased from the State by the wife. Proof of three years' occupancy of the land by them had been filed in the General Land Office and accepted, but afterwards the purchase of the land was forfeited by the State for nonpayment of interest and, the land having been reclassified, it was purchased from the State by L., and was conveyed by him to the wife as her separate property. Subsequently the land was sold at trustee's sale under power in the deed of trust, and the purchaser thereunder brought this suit against L. and wife for its recovery. Held, that by virtue of the covenants of warranty in the deed of trust defendants were estopped to set up the after-acquired title of L.

**2.—Same—Public Domain—Cases Distinguished.**

Lamb v. James, 87 Texas, 485, and cases following it, distinguished. School lands are not public domain after award and proof made of three years' occupancy, but are subject to execution and mortgage sale; citing Martin v. Bryson, 31 Texas Civ. App., 98.

Appeal from the District Court of Archer. Tried below before Hon. Ira Webster.

*Browning, Manning & Trulove*, for appellants.

*Turner & Boyce*, for appellees.

SPEER, ASSOCIATE JUSTICE.—This is an action of trespass to try title, instituted in the District Court of Armstrong County by J. B. Atkeson and wife, Willie D. Atkeson, against James Logue and his three minor children, to recover survey No. 96 in said county. The court entered judgment in favor of the plaintiffs for 440 acres of the land, after allowing 200 acres as the homestead of said Logue, upon the following conclusions of fact, which we adopt:

“(1) I find that on the 18th day of November, 1887, the land in controversy was awarded by the State of Texas to Mrs. Katie Logue in accordance with her application and obligation therefor. Said section of land being at the time State school land, classified as dry agricultural and appraised at the sum of \$2 per acre by the Land Commissioner of the State of Texas. Said land being known as section 96, block B4, certificate 15-3427, original grantee, H. & G. N. Ry. Co., containing 640 acres. The said Katie Logue and her husband, James Logue, were at the time of said application and award actually residing upon said land, they having settled upon it as a home. That the first payment of \$32 was made by the said Katie Logue to the Treasurer of the State of Texas at the time her application for the said land was made, and the interest payments due on said land were kept up to and including the first day of August, 1891.

“(2) I find that on the 2d day of January, 1891, the said Katie Logue filed in the General Land Office of the State of Texas her proof of occupancy for said land, signed also by R. E. McQueen, E. W. Con-



rad and W. J. Killough, three credible citizens of Armstrong County, which said proof of occupancy was accepted by the said Land Commissioner and was deemed sufficient by him.

"(3) I find that on the 15th day of May, 1891, while the said Katie Logue and her husband, James Logue, were still residing upon the land in controversy, they made, executed and delivered to E. G. Vick, trustee, their certain deed of trust of that date, containing the usual covenants of warranty, duly acknowledged by them as required by law, for the purpose of securing four certain promissory notes of even date with said deed of trust, each due on or before the 15th day of May, 1892, for the sum of \$225 each, bearing interest at the rate of 10 per cent from their date, with an additional 10 per cent for attorney fees, in case of suit to enforce collection; said notes providing, however, that in case the makers thereof, to wit, the said James Logue and Katie Logue, should sell either section 68 or 98 in block B4, Armstrong County, Texas, before the 15th day of May, 1892, then said notes should at once become due and should be paid out of the proceeds of such sale. But that should said section or any part thereof not be sold before the 15th day of May, 1892, then the notes should fall due on the 15th day of May, 1892; each of said notes reciting that it was secured by a deed of trust to all of section of land No. 96 in block B4, Armstrong County, Texas; each of said notes being payable to the order of J. B. Atkeson. And I further find that said deed of trust was filed for record in the office of the county clerk of Armstrong County, Texas, on the 27th day of May, 1891, and was recorded on the 28th day of May, 1891, in volume 1, pages 191, 192 and 193 of the deed of trust records of said county.

"(4) I find that E. G. Vick, the trustee in said deed of trust, removed from Armstrong County, Texas, to Russellville, Ky., in the summer of 1894, and resided in Russellville, Ky., continuously until August, 1902, when he removed to Bowling Green, Ky., where he has resided ever since and now resides. That the said Russellville, Ky., is about 1000 miles from Armstrong County, Texas; the railroad fare going and coming from Russellville, Ky., to Washburn, Texas, being not less than \$32. That the said E. G. Vick has not been in Texas since he left this State in the summer of 1894, and has had no intention of again becoming a resident of the State of Texas.

"(5) I find that at the spring term, 1893, of the District Court of Armstrong County, Texas, in Claude, Texas, the plaintiff, J. B. Atkeson, acting as the authorized representative of his father-in-law, Joe Lehman, to whom the note secured by said deed of trust had been duly indorsed and delivered on May 29, 1891, and also acting for himself as indorser on said notes, requested the said E. G. Vick to act in his capacity as trustee and sell the land in controversy under said deed of trust in payment of the indebtedness named in said notes, and that the said E. G. Vick then and there declined to do so, stating that there was not enough in it as compensation to him and that he preferred to have nothing to do with it. I find that no other request was made to the



said E. G. Vick at any time to sell said land. I find that thereafter and prior to the time the notes became barred by limitation, they were duly indorsed and delivered by Joseph Lehman to his daughter, Mrs. Willie D. Atkeson, who became the legal owner and holder of the same at the time of the sale of the land hereinafter mentioned under the deed of trust. No part of said notes having been paid, except the sum of \$75, which was paid thereon on the 16th day of May, 1891.

“(6) I find that the residence of the said E. G. Vick was unknown to the plaintiff, J. B. Atkeson, from the time he left Armstrong County, Texas, until after the sale of the premises in controversy under the deed of trust, and that the said J. B. Atkeson made inquiries among the citizens of Armstrong County in an effort to ascertain the whereabouts of the said E. G. Vick, prior to the time the said substitute trustee was appointed to sell the lands in controversy. And I further find that the said E. G. Vick would not have been willing to come from Russellville or Bowling Green, Ky., to Armstrong County, Texas, and act as trustee in the sale of said land, had he been requested so to do, unless he could know beforehand that he would receive compensation satisfactory to him, and that owing to the language of the deed of trust providing for his compensation, he could not know from the instrument alone what his compensation would be until after a sale of the premises should have been made.

“(7) I find that on the 1st day of May, 1894, the land in controversy was forfeited for nonpayment of interest due August 1, 1892, and was thereafter, on the 20th day of September, 1897, again classified, appraised and placed upon the market as dry grazing land at the price of \$1 per acre.

“(8) I find that the land was awarded to James Logue in accordance with his application and obligation to purchase the same, dated September 20, 1897, filed in the General Land Office September 30, 1897, he having paid to the State Treasurer the first payment of \$16. Said obligation being for the sum of \$624, and said sale having been made in accordance with title 87, chapter 12a of the Revised Civil Statutes of 1895, and the amendment thereto by the Act of May 18, 1897.

“(9) I find that the said James Logue filed in the General Land Office of the State of Texas on the 31st day of October, 1900, his proof of occupancy of the land in controversy, sworn to by himself, W. W. Hood, J. C. Finley and R. T. Harvick on the 27th day of October, 1900, before B. C. McCaleb, clerk of the County Court of Armstrong County, Texas, which proof was deemed sufficient by the Land Commissioner and by him accepted.

“(10) I find that the said James Logue has continuously resided upon the land in controversy from the time it was first filed upon by his wife, as hereinbefore shown, his wife residing thereon with him until her death, a short time prior to the institution of this suit. That the first payment of principal and all interest payments due the State of Texas have been made by the said James Logue since he filed upon



said land, and his account with the Land Office is in good standing as to said land.

"(11) I find that on October 27, 1900, James Logue, for the recited consideration of \$600, in and by his deed of that date conveyed the land in controversy to his wife, Mrs. Katie Logue, and that the consideration recited in said deed was to pay the said Katie Logue for certain money inherited by her from her mother's estate, and for which the said James Logue was indebted to her at the time of the execution of said deed.

"(12) I find that on the 12th day of April, 1901, Mrs. Willie D. Atkeson being the legal owner and holder of the notes described in the deed of trust hereinbefore mentioned, and no part of said notes having been paid, except the sum of \$75 on May 16, 1891, the said Willie D. Atkeson and J. B. Atkeson, her husband, by their certain instrument in writing, bearing date on the 12th day of April, 1901, duly acknowledged by them as required by law, made, constituted and appointed J. G. Rice of Armstrong County, Texas, as substitute trustee to sell the land in controversy in payment of the debt so evidenced by said notes and to satisfy the lien evidenced by said deed of trust; which said instrument is recorded in the deed of trust records of Armstrong County, Texas, volume 2, pages 78 and 79. Said appointment having been made in accordance with the provision in said deed of trust, authorizing the appointment of a substitute trustee in case of the failure, refusal or disqualification of the said E. G. Vick, trustee.

"(13) That on the first Tuesday in May, 1901, it being the 7th day of said month, the said J. G. Rice, as substitute trustee, proceeded to sell the property in controversy at the courthouse door of Armstrong County, Texas, at public sale, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said date, after having given notice by delivering to the said Mrs. Katie Logue and her husband, James Logue, a true copy of the advertisement of the said sale, on the 12th day of April, 1901, and also by posting up written notices of said sale on the 12th day of April, 1901, at three public places in Armstrong County, Texas, one of which was at the courthouse door of said county. And at said sale the premises were bought in by Mrs. Willie D. Atkeson, as her separate property, for the sum of \$300, and a deed was made, executed and delivered to her by the said J. G. Rice, substitute trustee, dated May 7, 1901. That said Mrs. Atkeson paid nothing on her bid, but the same was taken as an indebtedness on the notes which the deed of trust was made to secure. That defendant James Logue was present at said sale, and before the bidding begun he made a public announcement protesting that the sale was not legal, and that the land was the separate property of his wife, Katie Logue, and that the person buying would have a law suit to get the land.

"(14) I find that on the 31st day of May, 1902, Mrs. Willie D. Atkeson and her husband, J. B. Atkeson, made, executed and forwarded to the Land Office of the State of Texas their obligation in writing in



the sum of \$624, payable to the State of Texas as the balance of the purchase money for the land in controversy, said obligation providing for the payment of the annual interest of 3 per cent upon all unpaid principal together with one-fortieth of the original principal, to be paid to the State Treasurer at Austin, Travis County, Texas, on or before the 1st day of each November thereafter, until the whole purchase money was paid. Said application was in the usual form for such instruments, and was returned by the Land Office for the reason that the Land Office would not accept deeds from trustees, executors, administrators, heirs and sheriffs for the purpose of passing title to lands that had not been patented by the State. And I further find that when said obligation was sent to the Land Office, where it was received on July 4, 1902, it was accompanied by the deed from J. G. Rice, substitute trustee, to Mrs. Willie D. Atkeson. That said obligation was returned to J. B. Atkeson on July 7, 1902.

“(15) I find that at the time of the execution of the deed of trust herein, James Logue and his wife, Katie Logue, resided with their children on the land in controversy, and that it was then their homestead and has ever since been, and is now the home of the defendants herein. That they have placed valuable and permanent improvements on said section, consisting of houses, fences, well, windmill and tank, these improvements being on the south part of said section. That the Fort Worth & Denver City Railway runs across said section east and west, having a right of way 200 feet wide across said section, and leaving a tract of land across said section south of said right of way, on which the residence house, windmill and well of the defendants are located, and that there is a useful and valuable tank just on the north side of said right of way, and that in order to set aside to the defendants the improvements desired by them and cut off 200 acres for their homestead so as to include said improvements, the descriptions of said 200 acres should be as follows: All that part of said section lying south of the Fort Worth & Denver City Railroad right of way (being less than 200 acres), together with all improvements thereon, and in addition thereto enough of said section lying north of said right of way which added to said tract of land lying south of said Fort Worth & Denver City Railroad right of way shall make 200 acres all told, exclusive of said right of way 200 feet wide. The lines of said tract north of said right of way to be run as follows: Beginning at the point in the east boundary line of said section, 100 feet north of the center of said Fort Worth & Denver City Railroad track. Thence running north with the east boundary line of said section until a line running from the east boundary line of said section in a westerly direction and passing at least ten feet north of a dirt tank near said east boundary line shall intersect the right of way of said Fort Worth & Denver City Railroad, or the west boundary line of said section, at such point as that the area included within said limits north of said right of way shall, when added to the tract of land south



of said right of way, make the sum of 200 acres, exclusive of said right of way.

"(16) I find that the defendants, Hugh R. Logue, Chester Logue and Lily Logue, are minors, the children of the defendant James Logue and his deceased wife Katie Logue."

Appellants' principal contention is that the after-acquired title of James Logue did not inure to the benefit of the mortgagee, and the cases of *Lamb v. James*, 87 Texas, 485; *Raynor Cattle Co. v. Bedford*, 91 Texas, 642, and *Lang v. Crothers*, 21 Texas Civ. App., 118, 51 S. W. Rep., 271, are cited to support such contention. But it is clear that at the time of the execution by James Logue and wife of the deed of trust upon the land in controversy, such land was not public domain within the meaning of these authorities. It had been awarded by the Commissioner of the General Land Office to the mortgagor, Katie Logue; the required three years occupancy had been lived out, and proof of occupancy had been made and accepted by the General Land Office. Such lands are the subject of sale, of seizure upon execution (*Martin v. Bryson*, 31 Texas Civ. App., 98, 6 Texas Ct. Rep., 458), and, we think, of mortgage.

The court having found that the deed of trust contained the usual covenants of warranty, which we construe to mean a general warranty by appellant James Logue as well as his wife Katie, we think appellant is estopped thereby to assert his after-acquired title from the State, and the consequent invalidity of appellees' mortgage. Such title only fed the mortgage. *Bush v. Marshall* (U. S.), L. Ed. Book 12, 440; *Spies v. Newberg* (Wis.), 37 N. W. Rep., 417; *Blakslce v. Insurance Co.*, 57 Ala., 205; *Powers v. Patten*, 71 Me., 583. While Mrs. Logue was not bound by her covenant of warranty of title (*Wadkins v. Watson*, 86 Texas, 194), the husband James Logue, who is under no disability, was bound by his covenants. *Chaison v. Beauchamp*, 12 Texas Civ. App., 109, 34 S. W. Rep., 303; *Speer on Married Women*, sec. 68; *Powers v. Patten*, *supra*.

The decision in *Lang v. Crothers* is in nowise contrary to the holding in this case; there the after-acquired title of Crothers was the paramount title. The land having been forfeited by the Commissioner of the General Land Office for the nonpayment of interest due by Lang, the case stands as though Crothers held by mesne conveyances from Lang, and the doctrine of estoppel to assert an after-acquired title has no application to such a case.

All assignments are overruled and the judgment is affirmed.

*Affirmed.*

Writ of error refused.



CHOCTAW, OKLAHOMA & TEXAS RAILWAY COMPANY v.  
MRS. ELLEN TRUE ET AL.

Decided March 26, 1904.

**1.—Condemnation of Land—Special Damages—Pleading.**

Where plaintiff sued a railroad company in trespass to recover certain land and for damages caused by the erection of tracks and embankments thereon, and defendant by cross-plea asked to have the land condemned, which was done, and plaintiff awarded the value thereof, the admission, without sufficient pleading, of evidence of special injury to the land caused by the embankment was immaterial, as particularity of pleading is not required in condemnation proceedings.

**2.—Same—Juror—Fixed Opinion—Bias.**

In a condemnation proceeding wherein the jury awarded plaintiff, the owner of the land, less than one-half its value as testified to by him, and no complaint is made of the amount awarded as being excessive, it was not reversible error that the court, over objection, permitted certain jurors to sit in the case who had a fixed opinion that plaintiff ought to recover, they having further answered that such opinion, in their judgment, would not influence them.

**3.—Same—Evidence of Value—Harmless Error.**

So, in view of the amount awarded plaintiff for the land, of which no complaint is made as being excessive, it was harmless error that plaintiff was permitted to give in evidence "the value to him" of the land condemned and appropriated.

Appeal from the District Court of Potter. Tried below before Hon. Ira Webster.

*Reeder & Cooper*, for appellant.

*Wallace & Lumpkin*, for appellees.

CONNER, CHIEF JUSTICE.—This was an action in trespass and for damages, in which appellees allege that appellant is a corporation duly incorporated under the laws of the State of Texas; that appellees were the owners of lot No. 5 in block No. 158, and block No. 143, containing lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, in the town of Amarillo; that on or about the 1st day of May, 1903, appellant unlawfully entered upon said land and ejected appellees therefrom and still withholds possession thereof, to appellees' damage in the sum of \$1500; that appellant appropriated all of said lot No. 5 in block 158, the market value of which is \$125; that appellees had their home upon block 143, and had erected thereon their residence, barns, outbuildings, well, windmill and tanks, making the same a desirable home; that across the southeast corner of said block 143 appellant had erected an embankment about thirty feet high, which causes the dust to blow therefrom on appellees' home, making it an undesirable place; that said block of land was of the market value of \$2000, and that since said acts said block is of the market value of \$1000.

Appellant pleaded a general denial, and in reconvention to have the land appropriated by them condemned under the statute for right of way purposes. The case was tried upon appellant's plea, and resulted



in a judgment in favor of appellant for the land sought, and in favor of appellees for \$450 damages.

We find no reversible error presented on this appeal from the judgment stated, and nothing requiring extended discussion. It is urged that the court was in error in permitting appellees to offer evidence to the effect that the embankment mentioned in the petition obstructed appellees' view of the city of Amarillo, and impeded the wind in such manner and from such direction as to largely damage or impair the use of the windmill on appellees' premises. The objection was that such damages were special in character and had not been alleged in appellees' petition. There was no special exception, however, to the general allegation of damages, and we hence think the evidence offered admissible in the development of all the circumstances proximately resulting in the aggregated damage charged. Besides, as finally resolved, the case was one for condemnation on appellant's cross-plea, in which character it seems no particularity in pleading damages is required. Rev. Stats., art. 4472; Dallas P. & S. E. Ry. Co. v. Day, 3 Texas Civ. App., 353, 22 S. W. Rep., 538.

The court should doubtless have sustained appellant's challenge to the jurors expressing a "fixed opinion" that appellees "ought to recover," notwithstanding their further answers to the effect that such opinion, in their judgment, would not influence them. But the record manifests that no injury to appellant resulted, and we hence overrule the assignment raising this question. It was undisputed that appellant had appropriated one or more of appellees' lots, and had traversed others as alleged. For the lots actually appropriated appellees had undoubted right "to recover," and the fact that the damages awarded by the jury are much less than as estimated by and in behalf of appellees seems convincing that the objectionable jurors who were permitted to participate with others in the trial had no such "bias or prejudice" against appellant as disqualified them under Revised Statutes, article 3141; and the quoted answers of jurors relate to no other statutory disqualification in civil cases. The same general conclusion applies to the remaining assignments. The court gave in his charge the correct measure of damage, and the fact that appellee E. F. True gave in testimony "the value to him" of the lands appropriated and of the premises involved, seems entirely harmless in view of the jury's verdict for less than one-half of the damages thus fixed and of the fact that no complaint is made of the verdict as excessive. We think the evidence clearly supports the verdict and judgment, and no reversible error appearing the judgment is affirmed.

*Affirmed.*



## W. H. THOMAS, ADMINISTRATOR, v. JOHN R. HAWPE ET AL.

Decided March 26, 1904.

**1.—Administration—Final Account.**

An administrator's account showed a balance in his hands of \$304.51, and stated "there is unpaid audited amounts due to parties who have not applied for their pro rata aggregating \$269.15, leaving a balance to pay costs of final settlement and clerk's costs, etc., \$35.36." In his affidavit thereto the administrator stated that "the within and foregoing is a true and correct exhibit of said estate so far as the same has come to his hand or knowledge." It did not state, other than as above, what the indebtedness of the estate amounted to, nor set out the names and residences of the creditors entitled to the \$269.15, nor ask that the administrator be discharged. It was indorsed on the back "Final account," and notice was given as in case of filing a final account. The order of the court thereon mentioned it as a final account, but merely approved it and ordered it of record, the form of order required by the statute (Rev. Stats., art. 1876) in approving an annual exhibit. No order was made discharging the administrator. Held not a final account such as would be res adjudicata against the claim of the heirs for a restatement of the account made when the administrator asked for an order of final discharge twenty-two years later.

**2.—Same—Matters Not Included in Account.**

Even if the account was final so as to bar further inquiry into the matters set out and specified therein, it would not be final as to property accidentally or fraudulently omitted therefrom.

**3.—Same—Limitations and Stale Demand Not Applicable.**

The action of the administrator in filing a supplemental account twenty-two years later and asking a final discharge recognized the administration as still pending, but, aside from this, the statute provides that "where letters testamentary or of administration shall have once been granted, any person interested in the administration may proceed, after any lapse of time, to compel a settlement of the estate when it does not appear from the record that the administration has been closed." Rev. Stats., art. 1882.

**4.—Same—Annual Accounts Not Final.**

In a contest in the probate court between the heirs and the administrator showing the collection and disbursement of funds does not have the force of a judgment so as to preclude from contesting the same, and especially is this true when the heirs charge him with fraud.

**5.—Same—Costs.**

While the probate court has the power to adjudge the costs in probate proceedings (Rev. Stats., art. 2251), the district court has not the power, in such a cause brought to it for trial de novo, to adjudge the costs which might further accrue in the appellate courts in anticipation of an appeal from its judgment.

**6.—Same—Order Adjudging Costs Held Final.**

Where the county probate court, upon reinstating an administration case, adjudged the costs accruing prior to its dismissal against the contestants, such order became final at the end of the term, and, no specific complaint being made of it, it was not annulled by an appeal taken by the administrator to the district court.

**7.—Same—Creditors—Abandonment of Claims—Laches.**

Where creditors of an insolvent estate, after notice given by the administrator, have failed to assert their claims for over twenty-five years, it will be conclusively presumed, in a settlement between the heirs and the administrator, that such creditors have abandoned their claims by reason of their laches.

**8.—Same—Charging Administrator with Interest.**

Where an administrator appears to have applied funds of the estate to his own use, lending them out at good rates, he was properly charged on final settlement with the heirs with interest at the highest legal rate.

**9.—Same—Commissions—Fraud.**

Where the court found that an administrator had wrongfully and knowingly failed to account for certain moneys of the estate, it properly held that he was not entitled to commissions thereon.



Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*R. D. Coughanour and Henry & Henry*, for appellant.

*Wm. P. Martin and Wm. P. Ellison*, for appellees.

BOOKHOUT, ASSOCIATE JUSTICE.—On the 14th day of August, 1863, T. C. Hawpe departed this life intestate, in Dallas County, leaving an estate consisting of both real and personal property, situated principally in said county. E. A. Hawpe was his surviving widow.

On the 28th day of September, 1863, letters of administration on the estate of said decedent were granted to Mrs. E. A. Hawpe, survivor, and W. H. Thomas, now appellant herein. They qualified in terms of the law, and on the 29th day of September, 1863, filed their inventory of the property of said estate, which said inventory was on the day following approved by the court. On the 27th day of October, 1863, E. A. Hawpe and W. H. Thomas, as coadministrators of said estate, filed their final account, and on the same day the said W. H. Thomas moved the court that said account be taken as his final account, and that he be discharged, which was accordingly done by an order of the court made on the 30th day of November, 1863, and in the same order and by the terms thereof, Mrs. E. A. Hawpe, as administratrix of said estate of T. C. Hawpe, was required to come forward and give a new bond as such administratrix, which she did and proceeded with the administration. On the 26th day of June, 1866, Mrs. E. A. Hawpe, administratrix, having filed her final account and petition to the court to be discharged from further responsibility on account of said administration, prayed the court to appoint the said W. H. Thomas administrator de bonis non to said succession, all of which was accordingly done. On the 26th day of June, 1866, said W. H. Thomas, administrator, filed his inventory and appraisal of said estate, which was approved by the court on said day. The said W. H. Thomas then proceeded to administer said estate, filing annual exhibits thereof for the years 1867, 1869, 1872, and on the 6th day of September, 1877, he filed his account, styled "Final account," which said final account was, after due and legal notice thereof, approved by the court on the 20th day of October, 1877, but no order was made discharging said administrator. Said final account of said administrator shows that said estate was insolvent, and that said administrator, in obedience to an order of the district court sitting in probate, made upon and in approval of the report of E. G. Bower, auditor, filed February 1, 1873, paid the sum of 25 cents on each dollar of the indebtedness of said estate, and that there remained in his hands the sum of \$269.15, the pro rata of 25 cents on the dollar due on established claims belonging to creditors of said estate who had not called for their money, and that there remained in his hands a further sum of \$35.36, with which to pay cost of final settlement, clerk's



cost, etc. On September 25, 1899, J. R. Hawpe, W. L. Hawpe, G. T. Hawpe, Mrs. Elizabeth McPherson, joined pro forma with her husband, J. M. McPherson; Mrs. Matilda Thompson, joined pro forma with her husband, Dallas Thompson, and G. T. Hale as next friend of Herman Hale, appellees herein, claiming to be the heirs at law of the said T. C. Hawpe, deceased, filed a paper in the county court on the probate side of the docket, styled and indorsed "Plaintiffs' original petition," in which they charge that W. H. Thomas, now appellant herein, as administrator of the estate of decedent, held in his possession the sum of \$269.15 belonging to said estate that should be paid over to them with legal interest thereon from the 6th day of September, 1877, the date of the filing of his said final account, and they pray the court to make an order requiring him to pay over to them said sum of money and interest, together with the cost of their said application. On the 1st day of November, 1899, appellant filed a supplemental account referring to his said final account filed September 6, 1877, and approved October 20, 1877, but made no change therein; he does, however, show in said supplemental account that since the filing and approval of said final account he had made pro rata payment of 25 cents on the dollar of five of the established claims mentioned and approved therein, amounting to \$177.75, thus leaving \$91.40 to be paid on established claims included in said final account, and \$35.36 for payment of the probable cost of final settlement.

On this last account citation was issued by the clerk as required by law in cases where final accounts are filed, citing all parties interested in the estate to appear and show cause why the administrator should not be discharged. On November 27, 1899, the contestants filed a pleading styled "Contestants' petition," which by its terms purports to be an answer to the account filed by the administrator on the 1st day of November, 1899, and for the first time specifically demands a restatement of the administrator's said final and of his previous accounts and contests the right of the administrator to be discharged.

The case first came up for hearing in the probate court upon appellant's demurrers, filed May 18, 1900, to contestants' (appellees') second amended answer. Said demurrers were overruled, and appellant appealed from said ruling to the district court, where he was again overruled, and on appeal to the Court of Civil Appeals the case was dismissed for want of jurisdiction, the court holding that the order sought to be appealed from was not a final order. On May 18, 1901, A. B. Flanary was appointed auditor, and on November 1, 1901, filed his report, which was excepted to by all parties. On July 29, 1902, the case was dismissed for want of prosecution, at contestants' cost. On August 2, 1902, said cause was reinstated, and contestants were charged with all costs to said date.

On October 4, 1902, the case was tried in the county court sitting for probate, etc., upon contestants' third amended demurrers and pleas, filed February 24, 1902, and contestants' and the administrator's ex-



ceptions to the auditor's report, and resulted in a judgment for contestants against W. H. Thomas in the sum of \$21,385.87, from which judgment the said W. H. Thomas appealed to the district court.

On April 2, 1903, the case came up on appeal to the district court, and was tried *de novo*, on the same pleadings as in the county court; a jury was waived, and the matters of fact as well as of law were submitted to the court, and resulted in an order overruling the administrator's demurrers, and in a restatement of the administrator's account, and judgment for \$16,340.21 in favor of contestants and for costs. To all of which rulings and judgment of the court the administrator excepted and perfected his appeal to this court.

*Opinion.*—The first assignment challenges the correctness of the action of the trial court in overruling the administrator's general demurrer to the pleadings of the contestants. It is contended by appellant that the order of the county court of October 20, 1877, approving his account of September 6, 1877, and ordering the same of record is *res adjudicata*, and can not again be inquired into in this proceeding. The correctness of this contention depends upon whether or not said account was in fact a final account, and whether or not it was so considered and adjudicated by the court when the order was made approving the same and ordering it of record. This account is styled on the back thereof "Final account." It shows a balance in the hands of the administrator of \$304.51, and states "there are unpaid audited amounts due to parties who have not applied for their pro rata aggregating \$269.15, leaving a balance to pay costs of final settlement and clerk's cost, etc., \$35.36." In his affidavit to said account the administrator states that "the within and foregoing is a true and correct exhibit of the said estate so far as the same has come to his hand or knowledge." It does not state what the indebtedness of the estate amounts to. The only direct mention of any existing indebtedness is contained in the recitation above set out. It does not state the names of the creditors and their residences, entitled to the \$269.15, and "who have failed to apply for their pro rata." In this respect it fails to set out the names of the persons entitled to receive such portions of the estate. This account does not ask that the administrator be discharged. Notice was given as is required in cases of filing a final account. The order made by the court reads: "Now comes W. H. Thomas, administrator, and presents to the court his final account duly verified under oath showing the condition of said estate (the balance due said — being \$—), and it appearing to the court that due and legal notice of the filing same has been given and no objection thereto being made, said account is hereby approved and ordered of record." This is the form of the order required by the statute to be made in approving an annual exhibit, if the court upon examination finds the same to be correct. Batts' Civ. Stats., art. 1876.

Had the court considered said account the final account of the ad-



ministrator, it would have been its duty "to audit and settle the same." Batts' Civ. Stats., art. 2197.

This the court, it seems, did not do, but in the language of his order he approved the same and ordered it of record. We are of the opinion that the facts recited do not show that the court considered or adjudicated the account of the administrator filed September 6, 1877, as a final account. No order was then made discharging the administrator. We conclude the trial court did not err in overruling the appellant's demurrer to contestants' pleadings. However, if we are in error in this holding it seems clear the order is not final so as to bar further inquiry into matters not set out in the account and therein specified. It would not be final as to property accidentally or fraudulently omitted therefrom. *Blackwell v. Blackwell*, 86 Texas, 207; *McAfee v. Phillips*, 25 Ohio St., 374; *Griffith v. Gody*, 113 U. S., 89; *Woerner*, Am. Law of Admsr., sec. 506.

The pleadings of the contestants specifically charge appellant with having as administrator collected certain moneys on claims in his hands belonging to said estate which he failed to charge himself with in said account, but wrongfully and fraudulently appropriated and converted to his own use. Among other matters it is charged that he collected from O. L. Bailey on his note belonging to said estate \$1000 which he appropriated to his own use, also on the note of M. L. Swing he collected for said estate \$171.39, which he failed to charge himself with. They further charge him with having collected other sums belonging to the estate which he failed to account for. These matters not appearing in the account of September 6, 1877, would not be concluded by the order approving the same, even were we in error in holding that account was not a final account. The demurrer being general, if the contestants were entitled to recover for any of the matters set up in their pleadings, the same was properly overruled. After the filing of the account of September 6, 1877, no further action was taken by the administrator in the probate court until November 1, 1899, on which day he filed what is termed "Administrator's supplemental account." In this account he charges himself with \$304.51, the amount shown to be due certain creditors and court costs in his account of September 6, 1877. He then credits himself with \$177.75, the amount paid out by him since his last report, to five different creditors and exhibits vouchers showing such payment. This payment represents 25 per cent of the face value of these claims. This account shows that there are five other creditors holding approved items, whose pro rata allowance amounts to \$91.40 and gives the names of the creditors and states that "no one comes to claim them." This account shows a balance in the hands of the administrator of \$126.76. It gives the names of the contestants as the persons entitled to the residue of the estate and states the residence of each.

The administrator in filing this account recognized the administration as still pending. But independent of this fact, article 1882 of the Revised Statutes provides that "where letters testamentary or of admin-



istration shall have once been granted, any person interested in the administration may proceed, after any lapse of time, to compel a settlement of the estate when it does not appear from the record that the administration thereof has been closed." The record fails to show that the administration has been closed. This being true, and the contestants being the heirs of the intestate, T. C. Hawpe, deceased, are entitled under this statute to compel a settlement thereof. The administration not having been closed, the heirs were not barred by limitation or by reason of their action being a stale demand. *Main v. Brown*, 72 Texas, 505; *Branch v. Hanrick*, 70 Texas, 733.

It seems to be settled that in a contest of this character the approval by the probate court of the annual exhibits of the administrator showing the collection and disbursements of funds does not have the force of a judgment so as to preclude the heirs from contesting the same. And especially is this true when, as in this case, the heirs charge the administrator with fraud. *Ingram v. Rogers*, 2 Texas, 465; *Walker v. Kerr*, 7 Texas Civ. App., 498, 27 S. W. Rep., 299; *Birdwell v. Kaufman*, 25 Texas, 191; *Hefflefinger v. George*, 14 Texas, 581; *Sabrinosa v. Chamberlain*, 76 Texas, 624, 629; *Hagerty v. Scott*, 10 Texas, 525; *Murphy v. Menard*, 11 Texas, 675, 677.

It is insisted that the judgment adjudges against the administrator all costs of court in the administration, as well as costs on appeal in this court and the Supreme Court, should a writ of error be granted by that court. The court had the power to adjudge the costs. *Batts' Civ. Stats.*, art. 2251. The district court had no power to adjudge the costs which might accrue in the appellate courts in anticipation of an appeal from its judgment. We construe the judgment as adjudging against the administrator such costs as the district court had the power to charge him with. The judgment, as we construe it, adjudges against the administrator the costs that had accrued prior to the rendition of its judgment. However, we are of the opinion that the district court, in taxing the administrator with the costs accruing in the contest prior to July 29, 1902, erred. On that date the contest was dismissed for want of prosecution. On motion of contestants it was reinstated on August 2, 1902. Upon reinstating the case the county court adjudged the costs accruing prior to its dismissal against contestants and entered an order to that effect. This was an unconditional order, and at the end of that term of court became final. *Fenn v. Railway Co.*, 76 Texas, 380. The court had the power to make this order and it has not been set aside or appealed from. *Rev. Stats.*, art. 2255. So far as the record shows the contestants do not complain of this order. It was not annulled by the appeal taken by the administrator to the district court. This error does not require a reversal of the judgment, as this court has authority to reform the judgment in this respect.

It is contended that the court erred in decreeing that the money found to be in the hands of the administrator on a restatement of his account should be paid to the heirs of the intestate, when the record



shows that there are creditors of the estate whose claims are still subsisting, and that the estate is insolvent. The record shows that on September 6, 1877, there were a large number of creditors whose claims had been established against this estate, and that the estate was insolvent. None of these creditors appeared to contest that account, although notice was duly given. Nor did any of the creditors appear and contest the final account, filed November 1, 1899. So far as the record shows no action has been taken by any one of these creditors, seeking a collection of his claim, since the administrator's account of September 6, 1877, was approved by the court. None of them has joined in, or intervened in, this contest, and not one is here complaining. For over twenty-five years they have remained inactive and acquiesced in the action of the administrator, and it must be conclusively presumed they have abandoned their claims by reason of their laches. As before stated, the administrator, in his account filed November 1, 1899, names the contestants as the persons entitled to the residue of the estate.

It is insisted that the court erred in charging the administrator with interest. The court found that on September 6, 1877, the administrator had in his hands belonging to the estate \$4293.16, and charges him with interest on this sum at the rate of 12 per cent per annum from date to April 11, 1892, and at the rate of 10 per cent per annum from April 11, 1892, to date of trial, April 2, 1903. The interest charged is the highest legal rate allowed by the statute. It seems to be well settled that if a trustee having moneys in his hands knowingly applies it to his own use, or in his trade, he will be charged interest thereon at the highest legal rate. *Chifflet v. Willis & Bro.*, 74 Texas, 245; *Hill on Trustees*, star page 374 et seq.; 3 *Williams on Exs.*, 7 ed., pp. 404, 405.

The administrator denied that he loaned funds belonging to the estate. He says he loaned his own money, and loaned it at "good rates," at what would not be called "high rates." We are not prepared to say, in view of this evidence, there was error in charging him with the highest legal rate of interest on the moneys found by the court on a restatement of his account to be in his hands belonging to the estate. Nor did the court err in refusing to allow the administrator commissions on moneys in his hands belonging to the estate. The court having found that the administrator wrongfully and knowingly failed to account for said sums, he was not entitled to commissions thereon. *Schouler on Exrs. and Admsr.*, sec. 543, p. 640.

It is contended that the trial judge erred in charging the administrator with \$840 collected by him upon the note of O. L. Bailey. It is insisted (1) that the approval of the account of September 6, 1877, is *res adjudicata* of this matter; and (2) that this additional charge can not be found except upon the clearest proof, and that the evidence is insufficient to support the charge. The first contention is disposed of by the remarks under the first assignment. There is evidence to support the court's conclusion that this amount was received by the



administrator, that it belonged to the estate of the intestate, and that he has failed to account for the same. In deference to the finding of the trial court we conclude that on September 6, 1877, the administrator had, as administrator, cash on hand belonging to the estate in the amount found by the trial court, and that he has failed to account for the same.

The judgment will be reformed so as to charge the contestants with all costs accruing in this contest prior to July 29, 1902, including costs of this appeal. All other costs are taxed against the appellant.

Finding no reversible error in the record the judgment is affirmed.

*Reformed and affirmed.*

Writ of error refused.



## GEORGE H. WARD V. ROBERT FORRESTER ET AL.

Decided March 30, 1904.

## 1.—Trust Deed—Substitute Trustee—Evidence.

A written appointment, by the person secured by a trust deed, of a substitute trustee, reciting that the original trustee had declined to act, was evidence of the appointment of the substitute, but not of the happening of the contingency, the refusal of the original trustee to act, which by the terms of the trust deed authorized such substitution.

## 2.—Trust Deed—Recitals in Trustee's Deed.

A provision in a deed of trust, that, in any deed given by any trustee thereunder, any and all statements of fact or other recitals therein made as to the nonpayment of the money secured, or as to the time, terms and place of sale and property to be sold having been duly published, or as to any other preliminary act or thing having been duly done by said trustee should be prima facie evidence of the facts so recited, did not make the recital by a substitute trustee of the refusal of the original trustee to act evidence of such fact.

Appeal from the District Court of Red River. Tried below before Hon. Ben. H. Denton.

*Hale, Allen & Dahoney*, for appellant.

*S. W. Harman*, for appellee.

FISHER, CHIEF JUSTICE.—This is an action by appellees in form of trespass to try title, but the principal question involved is one of boundary between the surveys owned by appellant and those owned by appellees. Verdict and judgment of the trial court were in favor of appellees for the land in controversy.

The appellant by assignment of error complains of the verdict and judgment on the ground that they are not supported by the evidence; that the testimony shows that the boundary lines of the surveys should have been established according to his contention. While there is much evidence in the record that tends to support the appellant's theory, we are not prepared to say that the verdict of the jury in favor of the appellees is without evidence to support it. Therefore, we are of the opinion that this assignment is not well taken.

We are of the opinion that appellant's first assignment of error presents reversible error. As a muniment of title necessary to be shown by the appellees, the plaintiffs below, they introduced in evidence a deed executed by one Dinwiddie, as substitute trustee, conveying the land in question to the Texas Farm Land Company, from whom the appellees deraign title. This deed is predicated upon a deed of trust executed by one Splawn to secure a debt due the Security, Mortgage and Trust Company. One J. T. Dargan was, by the terms of this instrument, appointed trustee. The Security, Mortgage and Trust Company, the holder of the indebtedness against Splawn, executed an instrument which was offered in evidence, to the effect that Dargan had refused



and declined to act as trustee, and therefore Dinwiddie, as sheriff of Red River County, was appointed substitute trustee.

The appellant in the trial of the case objected to the introduction in evidence of the substitute trustee's deed, and to the instrument executed by the Security, Mortgage and Trust Company, appointing Dinwiddie as substitute trustee, on the ground that it was not shown that Dargan, the original trustee, had refused or declined to act, and that the mere appointment of the substitute trustee and the recitals contained in the deed executed by him of the fact of his appointment, were not admissible as evidence establishing the fact that Dargan had refused to act. The instrument offered showing the appointment of the substitute was admissible as evidence of that fact, and would authorize him to act, provided the contingency had occurred that authorized his appointment. The instrument evidencing the appointment is merely evidence of that fact, and could not be considered as establishing the fact that Dargan, the original trustee, had declined or refused to act. The statement contained in the instrument appointing the substitute trustee, that such was the case, is nothing more than the ex parte declaration and hearsay statement of the Security, Mortgage and Trust Company.

The deed of trust which was properly admitted in evidence, contains these recitals: It authorizes the trustee to sell the land as under execution after maturity of the debt, upon the request of the Security, Mortgage and Trust Company, or other owner and holder of the debt. It provides that in case of the death, absence, refusal or inability of Dargan as trustee to act, then the Security, Mortgage and Trust Company, or their legal representatives or other holder of the notes, may appoint a substitute trustee in writing, who shall have the same powers which were delegated to Dargan, the original trustee. And it was also provided that in any deed or deeds given by any trustee hereunder, any and all statements of fact or other recitals therein made as to the non-payment of the money secured, or as to the time, terms and place of sale and property to be sold having been duly published, or as to any other preliminary act or thing having been duly done by said trustee, shall be taken by any and all courts of law and equity as prima facie evidence that the said statements or recitals do state facts, and without further question, shall be accepted as such."

The deed executed by Dinwiddie, the substitute, recites that the original trustee, Dargan, refused to act; and contains other recitals as to the time, place and manner of sale and of his appointment as substitute and request to sell, and of advertisement of the land for sale, as provided in the deed of trust, etc.

Of course, it is conceded that the substitute was without power to sell, unless the original trustee had refused or declined to act upon request of the holder of the debt; but it is contended by appellees that the deed of trust, by reason of the recitals just stated, authorized the substitute trustee to make the recitals contained in his deed, and gave



them the effect, when so made, of prima facie evidence of the fact that the original trustee had refused to act, and of the further fact that the substitute was appointed in his place.

We are of the opinion that this effect can not be given to the recitals contained in the deed of trust. Those things which are established by the recitals contained in the deed of the substitute trustee relate to the nonpayment of the money secured, to the time, terms and place of sale and to the advertisement of sale, and as to any other preliminary act or thing having been duly done by said trustee. This latter clause evidently only relates to acts or things that were done by the trustee making the sale, or that were done by a trustee who was legally appointed. These recitals can not be construed to mean that it empowered the trustee, by recitals in his deed, to create evidence of his power to act, because he does not become a trustee authorized to make recitals, until he has been duly appointed, and the words "said trustee who is empowered to make recitals which will have the effect of prima facie evidence" refer and apply to a trustee who is empowered by virtue of an appointment to make such recitals.

We agree with appellant that it was incumbent upon the appellees to establish the fact that Dargan, the original trustee, had declined or refused to act, and that the appointment of the substitute by the holder of the note and the recitals contained in the substitute's deed were not evidence of Dargan's refusal.

For the error discussed, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## TEXAS MIDLAND RAILROAD COMPANY v. J. D. BOOTH ET AL.

Decided March 30, 1904.

**1.—Acting from Terror—Actual Danger—Pleading.**

Allegation of injury received in jumping from wagon in terror at alarm of team by railway train held sufficient to show that there was actual danger though not directly so stating.

**2.—Charge—Assuming Fact.**

Charge held erroneous as assuming the fact that there was real or apparent danger of the injured party being thrown from the wagon in which she was riding at the time she jumped therefrom and received injuries in consequence.

**3.—Negligence—Proximate Cause—Acting on Appearance of Danger.**

Where danger, real or apparent, caused by defendant's negligence is relied on as having caused the act of the injured party which, in the effort to escape such threatened danger, caused the injury, and not merely as excusing contributory negligence, such negligence of defendant can not be considered a proximate cause of the injury unless the circumstances created, in the mind of the injured person, a reasonable apprehension of danger.

**4.—Fright of Team—Contributory Negligence.**

Charge on contributory negligence of driver of team in approaching a railway crossing which, it is held, should have been given.

Appeal from the District Court of Delta. Tried below before Hon. T. D. Montrose.

*Chas. W. Ogden* and *A. H. Dashiell*, for appellant.

*Hatcher & Stell. L. L. Wood*, and *Bennett & Jones*, for appellees.

**STREETMAN, ASSOCIATE JUSTICE.**—The appellees recovered judgment against the appellant in the sum of \$5500 on account of the death of Mrs. Ella Booth, wife of J. D. Booth, and mother of the other appellees. The petition in substance alleges that the plaintiffs and Mrs. Booth were traveling together in a two-horse wagon and approached a crossing of appellant's railroad; that the view of the track was obstructed, so that they were unable to see a train until within a short distance of the track; that the appellant failed to give the statutory signals for the crossing, and for said reason the plaintiffs failed to discover the approach of said train until they were within some thirty feet of said track, "at which time said train passed over said crossing, scaring and frightening plaintiff's team and causing them to swerve and jump, which greatly excited and frightened plaintiff's wife, and that, in her efforts to save herself and child from the danger of being thrown from said wagon, she undertook to alight therefrom and fell to the ground out of said wagon, or in her fright and excitement was thrown, by reason of the surging and jerking of said team, from said wagon to the ground, and was thereby seriously and painfully injured internally, was greatly frightened and excited and severely shocked, and as a direct and proximate result of said fall, she being enceinte seven months, suffered a miscarriage on, to wit, the



20th day of August, 1902, which resulted in her death on the 24th day of August of said year. That his wife's said death was the direct and proximate result of the injuries, fright and shock caused by said fall."

Special exceptions were urged against the petition, and particularly that portion which is quoted above, because it fails to allege sufficient facts to show that there was any real or apparent danger or cause for fright. We think that it would have been well to have alleged directly that there was either actual danger or that there was a reasonable appearance of danger; but we are not prepared to say that the allegations in the petition do not necessarily import an allegation of actual danger; and we are also of opinion that the facts alleged would be sufficient, if shown by the evidence and found by the jury, to show that there was actual danger.

The court submitted issues to the jury in the case as follows:

"Therefore, if you believe from the evidence that the plaintiffs are the surviving husband and surviving children of Ella Booth, deceased, and that on or about the 17th day of August, 1902, the plaintiff J. D. Booth, together with the said Ella Booth, deceased, and their children, were traveling along the public road in Delta County, Texas, as set forth in plaintiff's petition, in a two-horse wagon, and coming towards the town of Cooper, and that said public road was crossed by defendant's railroad; and if you further find that the said plaintiff J. D. Booth, as he approached said crossing, coming towards the said town of Cooper, exercised ordinary care to discover the approach of trains at said time toward said crossing, and while in the exercise of said care continued to approach said crossing, and if you further believe from the evidence that when he had reached a point in about twenty yards of said crossing he discovered a train approaching at a rapid rate of speed, and before the plaintiff J. D. Booth could check his team hitched to said wagon, he was within about thirty feet of the track of said railroad, *and at such time said train passed over said crossing, scaring and frightening plaintiff's team, which caused them to surge and jump, which greatly frightened and excited plaintiff's wife, the said Ella Booth, if she was greatly frightened and excited, and that in her efforts to save herself and child from the danger of being thrown from said wagon, undertook to alight therefrom, if she did so undertake, and in so doing fell to the ground out of said wagon, if she did so fall; or if you believe from the evidence in her fright or excitement she was thrown from said wagon to the ground, by reason of the surging and jerking of said team and thereby was greatly frightened, excited and severely shocked, and if you believe from the evidence that she was enceinte as alleged by plaintiff, and that as a direct and proximate result of said fall, if she did fall, she suffered a miscarriage which resulted in her death, as alleged by plaintiffs, and her death was the*



direct and proximate result of the fright and shock caused by said fall; and if you further believe from the evidence, agents and employees of the defendant company knew or by the use of ordinary care could have known the surroundings of said crossing, and of obstructions, if there were obstructions, cutting off the view to persons traveling along said public road of defendant's trains, as alleged by plaintiffs, and if you further believe from evidence that the agents, servants and employees in charge of said train failed to blow the whistle and ring the bell on its locomotive engine at a distance of at least eighty rods from the place where defendant's railroad crosses said public road, and failed to keep said bell ringing until said engine had crossed said public road or stopped, and if you further believe from the evidence that if said bell had been rung and said whistle blown before reaching said public crossing, that plaintiff could and would have heard the same, and could and would have had warning of the approach of said train before driving so near the track of said railroad, and by reason of the notice given him by said ringing of the bell and blowing the whistle, would have avoided the scare and fright to his team drawing said wagon and the consequent shock and fright to his said wife and her death, and if you further believe from the evidence that at said time when said team became frightened that plaintiff J. D. Booth, and his said wife Ella Booth, were exercising that degree of care for their own safety that a person of ordinary prudence would exercise under the same or similar circumstances, then you will find for the plaintiff, unless you find for the defendant under the instructions hereinafter given you.

"But if you believe from the evidence that as the law requires said whistle was blown and said bell rung at the time complained of by plaintiff, or if the said J. D. Booth knew, or by the use of ordinary care could have known of the approach of said train in time to have stopped his team, so as to have averted the accident, if there was an accident, as complained of by plaintiffs at said time, or that the death of said plaintiff's wife was caused by premature childbirth, and that the same was not caused by the fright and shock received at the time she fell from the wagon, if she did fall, caused by the negligence of defendant, its agents, servants or employees, if they were negligent, or if you find that the premature confinement of plaintiff's wife was not caused by defendant's negligence, but was caused by undertaking a long journey in a wagon over a rough road, or was caused by negligently approaching a railroad crossing without looking or listening for approaching trains, or if you believe that plaintiff's wife in getting out of said wagon not in the exercise of ordinary care and there was no real or apparent danger which would cause her to have done so under the circumstances, *or if you believe from the evidence there was no*



*real or apparent cause for her fright, if she was frightened, and was due to her delicate condition and not to any negligence of defendant, its agents, servants or employes, or if you believe from the evidence that the death of plaintiff's wife was the result of any other cause and not the result of the fright and shock she received at the time she fell from said wagon which caused the premature birth of her child and her consequent death by the negligence of defendant, its agents, servants or employes, if they were negligent, then you will find for the defendant."*

By proper assignments and propositions complaint is made of that portion of the court's charge reading as follows: "And that in her efforts to save herself and her child from the danger of being thrown from said wagon, undertook to alight therefrom," because it assumes as a fact that Mrs. Booth was in danger of being thrown from the wagon.

This assignment is, in our opinion, well taken. The first paragraph of the charge above quoted fails to submit to the jury whether there was actual or reasonably apparent danger, and authorizes the jury to find for the plaintiff without passing upon that issue; and the paragraph quoted is open to the objection that it assumes the existence of such danger.

It is contended by appellees that the following paragraph of the charge corrects this error. The jury were instructed in said second paragraph: "If you believe that plaintiff's wife in getting out of said wagon was not in the exercise of ordinary care, and there was no real or apparent danger which would cause her to have done so, under the circumstances, or if you believe from the evidence there was no real or apparent cause for her fright, if she was frightened, and was due to her delicate condition, and not to any negligence of defendants, its agents, servants or employes, then you will find for the defendant."

We do not think that the paragraph quoted corrects the error in the first paragraph of the charge. In the first place, it will be observed that in this case the issue with reference to real or apparent danger does not arise out of the issue of contributory negligence, as it does in most cases, but is made the basis for the plaintiff's cause of action. In such case it may be doubted whether the issue of apparent danger ought to be submitted to the jury, unless it is supported by allegations in the pleadings of the plaintiff. We have stated before that the allegations of the plaintiffs' petition were perhaps sufficient to show the existence of danger; but it may be doubted whether they are sufficient to present any other issue, except that of real, as distinguished from apparent danger.

In the second place, we do not think that the charge of the court above quoted is an accurate statement of the law with reference to the



question of apparent danger. We understand, of course, that the rule in such cases is not what an ordinarily prudent person would do under the same circumstances. At the same time, we are of opinion that it is not every appearance of danger, however slight, which will relieve the injured party from the exercise of ordinary care. In our opinion, the rule is that there must be either a real danger or that the circumstances as they appear to the party at the time must be such as to create in the mind of such person a reasonable apprehension of danger. Otherwise the fright and consequent injuries could hardly be held to have been such a reasonable consequence of the negligence of defendant as to constitute such negligent act the proximate cause of the injury.

In the third place, it will be observed that the paragraph of the court's charge which is relied upon by appellees as correcting the erroneous instruction requires the jury, before they can find for defendant, not only to find that there was no real or apparent cause for the fright of plaintiff's wife, but that such fright was due to her delicate condition, and not to any negligence of defendants, its agents, servants or employees. We do not mean to state that the defendant would not have been entitled to a verdict upon proof of the facts stated, but we believe, as we have indicated, that it was not necessary to have proven all of these facts in order to entitle the defendant to a verdict.

For the reasons stated, we think that the error in the first paragraph was not eliminated by the clauses quoted from the second portion of the charge. *International & G. N. R. R. Co. v. Neff*, 87 Texas, 303; *Gulf C. & S. F. Ry. Co. v. Roane*, 1 Texas Law Journal, 118.

The eighteenth assignment of error complains of the refusal of the following special charge requested by appellant:

"You are instructed that the care which is required of persons driving near or approaching a railroad crossing is such care as an ordinarily prudent person would use under the circumstances, and if, therefore, you believe from the evidence that the plaintiff knew that his view of the defendant's track was obstructed by houses, trees and the lay of the ground, and that he further knew, or by the use of ordinary care might have known, that the team which he was driving would or might become frightened at the appearance or ordinary noise made by a railroad train, and if you further believe from the evidence that he knew, or by the use of ordinary care might have known, that the frightening of his team or near approaching with said team to a railroad crossing would result in the injury or fright to his wife in her condition, and if you further believe from the evidence that the plaintiff did not use that degree of care which an ordinarily prudent person would have used under like circumstances, and if you further believe from the evidence that the plaintiff's failure to do so caused or contributed to the accident, then you will find for the defendant."

It may be that the refusal of this charge would not constitute re-



versible error, but it presents a combination of facts relied upon by appellant as constituting contributory negligence, and we believe it would be proper for the court to give this charge upon another trial.

We do not pass upon those assignments which relate to the sufficiency of the evidence to sustain the verdict, as the evidence may not be the same upon another trial of the case.

We have considered all the remaining assignments of error, and find no errors except those herein pointed out.

Because of the errors mentioned in the charge of the court, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## D. W. HOWE ET AL. v. B. F. ROSE, COUNTY JUDGE, ET AL.

Decided March 30, 1904.

**1.—Public Road—Report of View—Objections.**

When, on petition for opening a road, a jury of view has reported and recommended a location, no form is prescribed for the objection to the commissioners court against its opening mentioned in article 4695, Revised Statutes; and a written statement by one through whose land it is surveyed that he will take a less sum than the damages assessed if it is opened around instead of across his land, is a sufficient objection to laying it out as surveyed to authorize the court to depart from the line surveyed by the jury and accept that offered by such land owner.

**2.—Same—Discretion of Commissioners Court—Mandamus.**

The commissioners court is invested by the statutes with a discretion in determining the necessity for a public road and its location, which can not be controlled by mandamus.

Appeal from the District Court of Coleman. Tried below before Hon. John W. Goodman.

*Woodward, Baker & Woodward and F. L. Snodgrass*, for appellant.

*T. H. Strong*, for appellee.

**FISHER, CHIEF JUSTICE.**—This is a suit by the appellants against the appellees constituting the Commissioners Court of Coleman County for a mandamus to compel that body to open and establish a public road.

The trial court sustained demurrers to the petition, and the appellants declining to amend, the case was dismissed. The petition is as follows:

“First. That the petitioners are resident citizens of Coleman County, Texas, at this time, and were such at the time the petition was filed with the Commissioners Court of Coleman County, Texas, for the public road hereinafter mentioned, and are interested in the establishment and opening out of the said public road, as laid out by the jury of view, as hereinafter mentioned and fully described, and the petitioners in this case were signers of the petition for said road as hereinafter set out as filed with the Commissioners Court of Coleman County, styled in the orders of court the Camp Colorado, Burkett and Cisco road No. 40.

“Second. That heretofore, to wit, on the 12th day of January, 1903, your petitioners, with other citizens of Coleman County, freeholders of said county, to the number of eight, signed a petition, which petitioned and asked the Commissioners Court of Coleman County, Texas, to lay out and establish a new second-class road, which petition was signed by eleven petitioners, and there was not less than eight freeholders included in the said number. That the said petitioners were freeholders in the precincts in which the said road was desired to be made, and the said petition specified the beginning and termination of



the said road proposed to be opened. That petitioner D. W. Howe gave twenty days' notice by written advertisement of the said intended application of the petitioners for said road by posting up the written notices of the intended application of said petitioners for said road at the courthouse door of said Coleman County, and also at two other public places in the vicinity of the route of said road, which said notice consisted of posting a written copy of the application for the said road. That the said petition for said road and all indorsements thereon which are each made a part hereof, was as follows:

"'Petition for a Public Road.—To the Honorable Commissioners Court of Coleman County, Texas: We the undersigned freeholders, residing in the precincts through which the following described proposed road will run, pray that a public road of the second-class road forty feet in width be established in said county, having its points of beginning and termination, course and intermediate points as follows: Commencing at the southern termination of the Camp Colorado and Burkett second-class at the southwest corner of section No. 25, H. T. & B. Ry. Co. land, thence in a southwesterly direction to Camp Colorado, in the James Bradshaw survey, and following, as far as practicable, the route of the third-class road originally laid out from Camp Colorado to Burkett and intersecting the Coleman and Camp Colorado and Byrd Store road at Camp Colorado, and ending at Camp Colorado in Precinct No. —, the whole distance being about four miles; and your petitioners pray that a jury be appointed to lay out and survey said road and to assess damages. And your petitioners will ever pray, etc. Dated the 2d day of December, A. D. 1902. Petitioners: B. F. Sullivan, R. V. Graves, W. A. Smith, B. W. Wallis, M. R. Golson, H. E. Miller, D. S. Tabor, W. A. Tabor, J. F. Bryant, D. W. Howe, R. E. Harris.

"'Filed the 12th day of January, A. D. 1903. R. V. Wood County Clerk. February 12, 1903, to next term. B. F. Rose County Judge.

"'Petition granted as prayed for, and the following parties appointed a jury of view, to wit: Geo. Rae, John Brown, F. B. Colvin, J. P. Henderson, T. A. Burns. B. F. Rose, County Judge.'

"Third. That at a regular term of the Commissioners Court of Coleman County, and after the said notices were posted, to wit, on the 14th day of May, 1903, the said petition was taken up in open court by the said Commissioners Court of Coleman County, and the said court then and there granted the said petition and duly entered their action upon the minutes of said court by the following order here now set out, to wit:

"'Road Minutes, Book 3, page 451, May Term, May 14, 1903. Camp Colorado, Burket and Cisco Road, No. 40. Whereas a petition has been filed in this court signed by the requisite number of freeholders, petitioning this court for a second class road forty feet wide, having its points of beginning and ending as follows, to wit: Beginning



at the southern termination of the Camp Colorado and Burkett second-class road at the northwest corner of section No. 25, H. T. & B. Ry. land, thence in a southwestern direction to Camp Colorado in the James Bradshaw survey, and following, as far as practicable, the route of the third-class road originally laid out from Camp Colorado to Burkett and intersecting the Coleman and Camp Colorado and Byrd Store road at Camp Colorado and ending at Camp Colorado, the whole distance being about four miles. The court is of the opinion that the petition should be and the same is hereby granted, and the following freeholders are hereby appointed a jury of view to lay out and assess damages for the landowners over whose land the road will run, to wit, Geo. Ray, John Brown, F. B. Colvin, J. P. Henderson and T. A. Burns, and make report to this court of all things done by them at the next regular term of this court.'

"Fourth—That the court appointed the persons as named in said order a jury of view, and all of said persons so named duly qualified as such jury of view, and after so qualifying, proceeded at a time agreed upon by them to lay out and mark the said road, and gave the notices in writing required to the landowners through whose land the proposed road would run of the time when they would proceed to lay out such road and assess the damages incidental to the opening of the said, and same was served for the time required by law and for at least five days. That the said jury of view, at the said time as agreed upon, did proceed to lay out the said road and mark same, and also after so establishing and marking the said road assessed the damages to the landowners affected thereby and upon claims filed by the said landowners and made their report in writing to the Commissioners Court of Coleman County, Texas, the 10th day of August, 1903, and returned with the said report the claims of the owners for damages and their assessment of damages to the said Commissioners Court, which said report and claims and assessment of damages was duly filed with the clerk of the said court, and same with all indorsements made a part hereof as follows:

"Report of Jury in Road Cases.—In the matter of the petition of D. W. Howe and others for a public road: To the Honorable Commissioners Court of Coleman County, Texas: We the undersigned freeholders and residents of the county of Coleman, and State of Texas, duly appointed a jury by the Commissioners Court of said county, at the May term thereof, A. D. 1903, as appears by the records of said court, to lay out, survey and describe a certain road designated in the application of D. W. Howe and others for a public road; having first been duly sworn according to law, and having given the five days' notice in writing to the landowners through whose land said proposed road may run, or their agents or attorneys, as required by law, did on the 10th day of August, A. D. 1903, proceed to view, lay out, survey and describe the premises designated in said application, and



would recommend that the said road be established in accordance with the field notes, survey and description of same, as follows:

“Beginning at the south end of the present located Camp Colorado and Burkett second-class road, the northeast corner of section No. 19 and southeast corner of section No. 20, both H. T. & B. R. R. Co., thence west with line between Nos. 19 and 20, 874 varas (Note R. B. N. W. of line) to stone mound 40 feet south of land line, thence south 45 west through said No. 19 (Note K, Note R. B. N. W.) of line at 1450 varas across wood branch 1600 varas in all on this line to a point in the east line of H. T. & B. R. R. Co. section No. 16, from which a liveoak bears south 41 west 12 varas, and a stone mound north 175 varas, thence south 41 through said section 16 (Note R. B. N. W. of line) 1051 varas to a stone mound in the north line of H. T. & B. R. R. Co., section No. 17, from which a stone mound bears west 241 varas, thence south 30½ west through said No. 17 (Note R. B. N. W. of line) 1922 varas to a cedar post in the east line of survey No. 432, from which the northeast corner of James Bradshaw survey bears north 118 varas, thence south 61 west 720 varas through said No. 432 to the intersection of the Coleman and Camp Colorado road at a gate just northeast from Henry Sackett’s implement house in Camp Colorado Post.

“We would also report that having notified all the parties interested in our intended meeting, and of the purpose thereof, we did then and there hear all the testimony offered in relation to the damages sustained by the laying out of said road, and do assess the damages thereof due to each particular landowner (who presented to us a written claim for damages which is hereto attached) as follows, to wit:

“Henry Sackett, 6 2-10 acres, H. T. B. R. R. Co., sec. No. 19; Henry Sackett, 2 7-10 acres, H. T. B. R. R. Co., sec. No. 16; Henry Sackett, fence through Nos. 16 and 19, 5302 varas on both sides; J. C. Dibrell, 5 acres, H. T. B. R. R. Co., sec. No. 19; J. C. Dibrell, fence through No. 17, 3844 varas on both sides; Henry Sackett, 1 5-6 acres No. 432, 1440 varas on both sides; Henry Sackett, 10¾ acres roadbed at \$7, \$75.25; Henry Sackett, 3 1042-1900 miles fencing at \$85 per mile, \$300; Henry Sackett, damages in secs. Nos. 16 and 19 for tankage \$85, total \$460.25. J. C. Dibrell, 5 acres roadbed through No. 17, H. T. & B. R. R. Co., at \$7 per acre, \$35; J. C. Dibrell, stock bridge, \$75; J. C. Dibrell, fencing 2 44-1900 miles at \$85 per mile, \$172; J. C. Dibrell, damages to land cut off northwest corner of No. 17, at \$1 per acre, \$159, total \$441. All of which is respectfully submitted. In testimony whereof we have hereunto set our hands, this 10th day of August, A. D. 1903. J. A. McElrath, Surveyor; T. A. Burns, Geo. Rae, J. P. Henderson, J. C. Brown, Jurors.”

“Coleman, Texas, August 10, 1903.—To the Hon. Road Reviewers of the Camp Colorado and Burkett Road: I hereby claim as damages for the amount of land utilized by the above road running across my land, to wit: If road is located as viewed on July 20, 1903, I claim



a stock bridge valued at \$75; 5 acres of land I value at \$7.50 per acre, and incidental damages on portion of land cut off at \$1 per acre, to be surveyed by county surveyor, 159 acres, \$159, and \$85 per mile for fencing said lane, 2 miles, \$170, total \$439. If road is located on north and west boundary line of section 17 H. T. & B. R. R., as asked for by me, all I ask is \$5 per acre for roadbed, 7 acres at \$5—35. J. C. Dibrell, Claimant.'

"'Coleman, Texas, August 10, 1903.—To the Hon. Road Reviewers of the Burkett and Camp Colorado Road: I hereby claim as damages for the amount of land utilized by the above road running across my land, based on the adoption of route as reviewed by you, and in keeping with the field notes as substituted by the county surveyor: For roadbed through sections Nos. 17 and 16, H. T. & B. R. R. Co. and James Bradshaw survey, No. 432, about 10¾ acres, \$100, for fencing road surveys 6742 varas, \$315; for damages to section No. 19, H. T. & B. R. R. and No. 16, \$85; in Coleman County, \$500. Henry Sackett, Claimant.'

"Fifth. That the said report of the said jury of view came on to be heard thereafter on the 19th day of August, 1903, and that same was submitted to the court and the petitioners represent that no objection was filed to the said report of the said jury of view. That same was duly considered in open court and the said court decided that the road was of sufficient importance to be opened. That the same was an application for a new road (that is, a second-class road where no second-class road existed) on the route as far as practicable of a third-class road between the said points mentioned in the said order, which said third-class road had been previously established. That the said court at the time was not composed of a full court. That there was present at that time but three of the commissioners together with the county judge of Coleman County. That the order of the said court as then made is as follows:

"'In Commissioners Court: This court this day, August 14, 1903, having under consideration the report of the jury of view on proposed second-class road from the southeast corner of section No. 20 to Camp Colorado Post on the James Bradshaw sur. No. 433, pursuant to adjournment of the regular August term, 1903. It is ordered by the court that said report be and the same is hereby approved and adopted in all things, except as to the route as surveyed over section No. 17, H. T. & B. R. R. Co. land owned by J. C. Dibrell, and in lieu of the route therein set out and the damage to said landowner the roadbed offered by said Dibrell is accepted and adopted, to wit: 40 feet of land south and west of the north and west line of said section No. 17 from the point where said jury of view's survey of road crosses the said north line of said survey No. 17 to the point where it crosses the west line of said survey, and that the sum of \$1 be allowed said J. C. Dibrell, owner of said survey No. 17, in lieu of the damage allowed him



by the jury of view; and it is further ordered that the county treasurer of Coleman County set aside in his office, subject to the order of the various landowners, the sum of \$461.25 to pay the damages herein allowed, and that the county clerk issue scrip on the road and bridge fund in the proper amount in payment of same, and that the road overseers through whose road precincts said road runs proceed at once to open same for public travel.'

"The act of said Commissioners Court as shown by the petition herein and the order on the report of the jury of view was in effect altering and changing a third-class road into a second-class road; that the said order of the Commissioners Court as to that part of the road laid out and established by the jury of view which was rejected by them, and another route established by the said court, was in excess of the power of the said Commissioners Court; that no jury of view was appointed to lay out or survey that portion of the route adopted by them, which was a change from the route selected by the jury of view; that that part of the changed route adopted by the court was not made after an actual view of the same by a majority of the Commissioners Court of that portion of the road sought to be changed; that is to say, said route was only viewed by the county judge and two of the said commissioners; that said change from the route as reported by the jury of view was not made with the unanimous consent of all the commissioners elected; that there were but three commissioners present with the county judge; that in adopting said change the county judge did not vote, and two of the commissioners voted for said change while one of the commissioners voted against said change in said road; that the said change as made and adopted by the Commissioners Court lengthened the route of the original third-class road, and the route of the second-class road, as reported by said jury of view, about 777 varas; that said commissioner that voted against the adoption of said change was one of the commissioners who made an actual view of said route; that there being no objection filed to the report of the jury of view and same thereby accepted by all parties at interest, the court acted in excess of its authority and had no discretion in the matter, but it was the duty of the court to adopt the said route as reported by the jury of view, and your petitioners and the general public had the right to demand that same be adopted; that the court in violation of its statutory duty, adopted a different route as to a portion of said route so reported under the circumstances as hereinbefore stated; that the court thereby, in the manner in which the said route was adopted, also acted in excess of its authority under the law. That the route reported by said jury of view and the route adopted by the court is indicated by a sketch hereto attached marked Exhibit "A," the dotted lines indicating the route adopted and change made by the court, and straight lines indicating the route reported by the jury of view; that no objection was filed to the report of the jury of view and no objections made by anyone



or the Commissioners Court to the damages as assessed, and amount assessed was satisfactory to landowners.

"That the change in the said road will be a source of inconvenience to the traveling public using the said route, and especially to the petitioners herein. That petitioners will use and travel said road and in so doing will be compelled to travel the extra distance in order to do so and will also be compelled to travel over a steep, abrupt hill hard to pull same, and the said route between the points covering the change is a more impractical route than the one reported by the jury of view. That it will require a considerable outlay of money to put said part of said road in condition to travel same, and then the route and road will be the distance longer than the one reported as hereinbefore alleged, and will be a much harder route on teams and vehicles to travel. That the route as reported is a good smooth route without any hills and will make a good roadbed at small cost.

"That your petitioners are interested in the location and establishment of said road as reported, because they will wish at times to travel same. That in traveling to the county site of Coleman County and to the market for their produce, the petitioner D. W. Howe and a majority of the parties signing the said petition will use the said road as the nearest and most practical route thereto, and are interested in so doing in having the shortest route and the best route for the said road. Petitioners are therefore directly interested in having the route as reported by the said jury of view adopted and laid out by the said court, and the said route as adopted in so far as the same changes the said route as laid out by the said jury of view rejected and set aside.

"The petitioners are all farmers and raise produce such as is usually raised on the farm, and it is necessary to transport same to market, and in so doing will of necessity travel the said road as the most practical route.

"That your petitioners are entitled to have this court issue a writ of mandamus to the said Commissioners Court, and the said county judge, compelling them to adopt the said route as reported to the court by the said jury of view, and to issue a writ of mandamus compelling them to set aside the said order changing the said route, and a writ of injunction restraining them from opening and laying out and working the said road on that part of the route as changed by the said order, for each and all of which they pray upon the facts as stated herein.

"Wherefore, your petitioners pray that the court grants them a preliminary writ of mandamus to the said defendants, requiring them to appear and show cause why the said writ should not be made permanent and that the hearing be set down for some day as the court may direct, and in the alternative that citation issue herein to the said defendants and they be required to answer herein, and upon hearing hereof that the court issue the writ of mandamus compelling and directing the said Commissioners Court to adopt the said report of the



said jury of view, as under the law it was their duty to do, instead of the route as made by them in so far as the change was made by them, and for such writs as may be necessary to compel the said court to set aside the said order in so far as the same adopts any other route than the one reported by the jury of view, and for such writs as may be necessary to enjoin the said court from opening out the said route, except as reported by the said jury of view and for costs and general relief."

It will be seen by the averments of the petition that the road in question sought to be established was a new road, and the purpose was not to alter or change a public road already existing. The Commissioners Court, according to the averments of the petition, did, in effect, adopt the report of the jury of view, with the exception that where the road passed over the land of one Dibrell they changed and deviated the course so as to increase the distance about 700 varas. It is averred in the petition that no objection was filed to the report of the jury of view, but the petition does set out a document signed by Dibrell, in which it is stated that he will remit the damages in his favor of \$439, which were awarded to him, if the road is located on the north and west boundary line of his section 17, as asked for by him, and for which he will only charge \$35.

It is contended by appellants that this does not constitute an objection. It appears from the averments that this request and proposition made by Dibrell was accepted by the Commissioners Court, and the road changed in accordance with the proposition there submitted. Article 4695 of the Revised Statutes, which is relied upon by the appellants as establishing the fact that the Commissioners Court, when no objection is filed, could not exercise any discretion in the matter, but must establish the road as selected by the jury of view, provides that if no objection be filed upon the report of the jury appointed upon an application to open a new road, the court shall proceed to establish and classify such road and order the opening out of the same, and shall appoint an overseer and apportion hands for same, as in other cases. The instrument copied in the petition signed by Dibrell is of a character to inferentially suggest to the mind of the Commissioners Court that he objects to the road being established where located by the jury of view, for he says that if the road is located as asked for by him, then he will remit all of the \$439, except \$35. The statute does not undertake to say what shall be the character and form of the objection presented to the Commissioners Court by the landowner, when it is sought to establish a road across his lands. Any written statement that indicates to the mind of the court that the landowner does object, would be sufficient for that court to pass upon the question as to whether the objection should be considered and the report of the jury of view approved or disapproved.

In this instance the Commissioners Court evidently considered that Dibrell's statement was tantamount to an objection; and if such is the



case, and the document is sufficient to constitute an objection, then the provision of the statute as quoted, which is relied upon by the appellants, authorized the Commissioners Court to exercise some discretion in passing upon the question as to whether they will or will not establish the road as reported by the jury of view. The Commissioners Court in passing upon this question evidently considered that there was an objection before them, and the averments of the petition do not establish the fact that they abused their discretion in passing upon this question.

Furthermore, independent of the view expressed, we are clearly of the opinion that the other provisions of the statute bearing upon the question of the authority of the Commissioners Court to open and establish roads are not arbitrary, but give to the court some latitude and discretion in determining the necessity of a road, and whether it should be established. *Huggins v. Hurt*, 23 Texas Civ. App., 405; *Allen v. Parker County*, 23 Texas Civ. App., 536. In both of these cases a writ of error was refused. In the first case, after quoting provisions of the statute, the court says: "The inference therefore, is that the Legislature intended that the action of the Commissioners Court as to the necessity of a road, its proper location, the form of the petition, the qualification of its signers and all other issues, save that relating to the damages, should be conclusive." In the last case cited this doctrine is practically reaffirmed, and the case of *Cummings v. Kandall County*, 7 Texas Civ. App., 165, relied upon by appellants, is, in effect, disapproved. Of course it is conceded that if such discretion existed, it could not be controlled by mandamus.

We find no error in the judgment, and it is affirmed.

*Affirmed.*

Writ of error was refused by the Supreme Court, June 16, 1904.



GULF, COLORADO & SANTA FE RAILWAY COMPANY v.  
T. N. PHILLIPS.

Decided March 30, 1904.

**1.—Charge—Assuming Facts.**

Charge held erroneous and on the weight of evidence because assuming the fact that plaintiff's deceased son, for causing whose death defendant was sued, was of industry, capacity and disposition to continue to earn money and contribute to the father's support in the future.

**2.—Transcript—Matters Improperly Included.**

The inclusion of matters not properly belonging in the transcript (a motion for continuance on which no errors were assigned and affidavits relating to exceptions not saved by bill) was not ground for striking out the statement in the appellate court, but merely for taxing appellant, though successful, with the unnecessary cost incurred.

Appeal from the District Court of Coleman. Tried below before Hon. John W. Goodwin.

*J. W. Terry and Ballinger Mills*, for appellant.

*Woodward & Baker*, for appellees.

KEY, ASSOCIATE JUSTICE.—Appellee brought this suit against appellant to recover damages on account of the death of his son, Wylie Phillips, alleged to have been caused by the negligence of appellant. The trial resulted in a verdict and judgment for plaintiff for \$5000, and the defendant has appealed.

In charging the jury, the trial court used this language: "If you find for plaintiff you will give him such damages as you believe from the evidence will compensate him for the pecuniary loss, if any, sustained by him in the death of his son, Wylie Phillips. In estimating this pecuniary loss, if any, you may take into consideration the age of plaintiff and his physical condition, the wages which deceased Wylie Phillips was earning, if any, and the amount, if any, he contributed to the plaintiff's support, the industry of the deceased, and his capacity, ability and disposition to continue to earn money and contribute to plaintiff's support."

One of the objections urged to the paragraph of the charge quoted is that the last clause was on the weight of testimony, and we sustain the objection. The clause referred to assumes that the deceased was industrious, had capacity, ability and disposition to earn money and continue to contribute to the plaintiff's support. It may be conceded that there was undisputed testimony showing that he was industrious, had capacity and ability and disposition to earn money, and that up to the time of his death he had contributed to the plaintiff's support, yet the facts that he would continue to earn money and contribute to the plaintiff's support in the future, or that his disposition was such as to indicate that he would so continue to do, were facts,



if existing at all, to be inferred from other facts established by the testimony; and therefore the charge of the court should not have assumed their existence. Considering the size of the verdict, we are not prepared to say that the error was harmless.

The matters referred to in the sixteenth, seventeenth and eighteenth assignments of error are not likely to arise upon another trial, and the questions of law sought to be presented under those assignments need not be decided.

On all other questions of law we rule against the appellant. We express no opinion as to the merits of the case as developed by the testimony.

Appellee has submitted a motion to strike out the transcript, because it contains certain documents which should not be embraced therein. The transcript contains a motion for a continuance and the reply thereto and the order overruling the same, and not only is no error assigned to the action of the court in overruling the motion, but the record shows that the witness, on account of whose absence the application is made, appeared and testified in the case. The court adjourned September 26, 1903, and thirty-four days thereafter appellant filed an affidavit and certain other documents relating to his efforts to obtain a bill of exceptions. A bill of exceptions could not have been filed that late, nor do we think appellant had the right to file the documents referred to at that time, especially as no reason is shown why they were not filed earlier. We therefore hold that the documents last referred to, as well as those bearing on the subject of continuance, should not have been incorporated in the transcript. But we do not think the entire transcript should be stricken out and the appeal dismissed on account of the matters referred to. However, appellant should pay all the expenses caused by the filing of the papers referred to, and their incorporation in the transcript, which we have estimated at \$10, and which amount of costs are here taxed against appellant. The remainder of the costs are taxed against appellee.

The judgment reversed and cause remanded.

*Reversed and remanded.*



## TEXAS SOUTHERN RAILWAY COMPANY v. J. L. LONG.

Decided March 30, 1904.

**1.—Evidence—Negligence—Opinion.**

A plaintiff suing for injuries received in getting off a moving train should not have been permitted to testify that he could have got off safely if the train had not been jerked at the time; it was, in effect, permitting a non-expert to give an opinion on the question of his own negligence.

**2.—Negligence—Jerking Train—Notice—Charge.**

On the issue of negligence by a railroad company in jerking a train while plaintiff was getting off from it in motion, a charge that it was defendant's duty to use ordinary care to keep from injuring him while he was attempting to alight was error, in ignoring the question of the defendant's notice of the fact that he was about to alight, which was not cured by an instruction correctly stating the law in another paragraph.

**3.—Negligence—Charge—Contributory Negligence.**

A charge which instructs the jury to find for plaintiff if injured by defendant's negligence, ignoring the issue of contributory negligence, is not cured by the proper submission, in another paragraph, of contributory negligence as constituting a defense.

**4.—Negligence—Notice of Perilous Position—Charge.**

The use, in a charge, of the term "constructive notice" with reference to circumstances charging defendant with duties arising from the fact that plaintiff was attempting to get off its train while in motion, though inaccurate, was not misleading, where the circumstances which would be equivalent to notice were correctly stated.

Appeal from the District Court of Upshur. Tried below before Hon. R. W. Simpson.

*Scott & Jones and Barnwell & Eberhart*, for appellant.

*Warren & Briggs and M. B. Briggs*, for appellee.



**KEY, ASSOCIATE JUSTICE.**—Appellee sued appellant to recover damages for personal injuries, and from a judgment in his favor this appeal is prosecuted.

We sustain the third assignment of error, which complains of the ruling permitting the plaintiff to testify in his own behalf that if the train had moved in the usual way, without giving any unusual jerks or jar, he could have gotten off the train safely, and that he had gotten off of trains before and was not hurt. The plaintiff was injured while attempting to get off of a moving train, and he charged the defendant with negligence in causing the train to jerk or jar; and the defendant charged him with negligence in attempting to get off of the train while it was moving, and in the manner he did.

It seems to us that in the testimony complained of the plaintiff was permitted to indicate to the jury his opinion upon the question of his own negligence. While there are certain exceptions to the general rule excluding the opinions of nonexpert witnesses, it is uniformly held not permissible for such a witness to give an opinion covering the entire case, or upon a state of facts relied upon as a defense.



In a separate paragraph, and without referring to any other portions of the charge, the court instructed the jury that "it was the duty of the defendant's employes to use ordinary care, as that term has been defined to you, to keep from injuring the plaintiff while he was attempting to alight from the train." In other portions of the charge the jury were told that the defendant would not be liable unless, among other things, it had notice of the fact that the plaintiff desired to alight from the train. The paragraph quoted was erroneous, because it omitted the question of notice, and it has been held that such an error is not cured by correctly stating the law in another and different paragraph, which does not refer to and correct the one which is erroneous. *Baker v. Ashe*, 80 Texas, 356.

The eighth and ninth paragraphs of the court's charge submitting the plaintiff's side of the case affirmatively to the jury, are subject to the same objection, because they told the jury if they found the facts to be as therein recited to find for the plaintiff, thereby eliminating the question of contributory negligence. The paragraphs referred to should have told the jury that if they found the facts therein recited to find for the plaintiff, unless they found for the defendant under other paragraphs of the charge.

We do not think the jury were misled or misdirected by the use of the words "constructive notice" in the court's charge. The court gave the jury definitions of what was meant by actual and constructive notice; and while it may have been inaccurate to denominate the latter "constructive notice," yet, considering the definition thereof given by the court, we hold that appellant has no ground of complaint in reference thereto.

On all the other questions of law presented, we rule against the appellant.

For the error indicated, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## H. B. RICE, ADMINISTRATOR, v. J. D. CONWILL.

Decided March 30, 1904.

**1.—Lease—Improvements—Administrator—Lessee.**

The only power conferred upon administrators, in connection with the repair of improvements on estates, is to keep the buildings in tenantable repair (Rev. Stats., art. 1983) and under a lease contract an administrator could not bind the estate for improvements made by the lessee.

**2.—Administrator—Agent—Delegated Powers.**

An administrator can delegate to an agent power to do only mechanical or ministerial acts, but in matters of discretion affecting the very existence of the property of an estate the power must be exercised by the administrator.

Appeal from the County Court of Limestone. Tried below before Hon. James Kimbell.

*Bucker & Smith*, for appellant.

*W. A. Keeling* and *A. J. Harper*, for appellee.

FLY, ASSOCIATE JUSTICE.—Appellant instituted this suit against appellee on a promissory note for \$675 alleged to be due for the rent of a farm in Fannin County, belonging to the estate of W. M. Rice, deceased, of which appellant was administrator, for the year 1902. It was admitted that \$475 had been paid on the note. Appellee answered admitting that he had rented the farm and had given the note, but alleged that W. G. Rucker, an agent for appellant, authorized appellee to make all necessary improvements on the farm and promised to pay appellee for them; that said Rucker paid for the improvements made in 1901, but had refused to pay for improvements made in 1902, although he had agreed to pay \$200 for the same. Appellee in addition to a claim for improvements alleged that the agent had agreed to pay him \$50 for assisting him in selling land belonging to the estate, which sums were pleaded in offset to appellant's claim. The cause was tried by jury and resulted in a verdict and judgment in favor of appellee for \$200.

The rental contract was for three years and was made by and between W. G. Rucker, acting for the administrator, and appellee. It is not pretended that the agreement in regard to improvements was a part of the written contract, but the claim for improvements is based on a letter written after the execution of the contract, by Rucker to appellee, which was not produced. It was not alleged or proved that the administrator had authorized the building of the improvements, or that he had any authority from any court to make such improvements.

Administrators are creatures of the statutes and have no powers except those conferred therein. The only direct and specific power conferred upon administrators in connection with the repairs or improvements of an estate is, that he is authorized to keep the buildings in tenantable repair, extraordinary casualties excepted, unless not directed



to do so by an order of the court. Rev. Stats., art. 1983. It is not pretended that the improvements for which pay is demanded by appellee could be justified by that statute.

In article 1984 it is provided that the executor or administrator shall carry on a plantation, manufactory or business belonging to the estate, or cause the same to be done, or rent the same as shall appear to him to be most for the interest of the estate. Appellant rented the farm, and when he had done so he had exhausted all the authority given him by the last named statute in connection with the farm. The two statutes cited give all the authority that appellant had without resorting to a court for orders. In this case the administrator is charged with ditches to the amount of \$365.81, pools \$322.06, and lumber, paint, papering, selling land, hauling and building barns and sheds in the sum of \$311.49. The administrator, in the absence of an order of court, had no authority to contract in person, much less through the medium of an agent, for such improvements. If such power was vested in an administrator it would often result, as in this case, not only in consuming the entire income from the property, but in becoming a charge thereon, and in some instances in consuming the entire property to pay for improvements.

If the administrator had been given such authority by the laws of the State it did not authorize him to delegate matters of such momentous discretion to an agent. Acts which are merely mechanical or ministerial may be committed by the administrator to an agent, but in matters of discretion where the very existence of the property of the estate may be at stake, the power must be exercised by the administrator. *Terrell v. McCown*, 91 Texas, 231.

The contract for the improvements being clearly beyond the power of the administrator, there could, of course, be no ratification of it by the administrator. However, there is nothing to indicate any attempt at ratification. The agent denied that he ever made such a contract and knew nothing about the improvements being made.

It may appear to be a hardship on appellee that he can not recover for the improvements, but the laws of the State put him on notice that an administrator could not make such contracts, and it is much better that he should be the loser than that a precedent should be laid for the collection of claims against an estate that have not arisen in a statutory manner.

Appellee has admitted the justice of the claim of appellant, and it is therefore the order of this court that the judgment of the County Court be reversed, and the judgment be here rendered that appellant recover of appellee the sum of \$200 with interest at the rate of 10 per cent per annum from December 1, 1902, and 10 per cent attorney's fees, and that the landlord's lien be foreclosed on the property described in the petition, which was seized under a writ of sequestration, and that appellant recover all costs of this and the lower court.

*Reversed and rendered.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v.  
G. F. HUTCHENS.

Decided March 30, 1904.

**1.—Fellow Servants—Truckman—Cleater—Charge—Negligence.**

Evidence held to show a "cleater" or "sealer," whose duty it was to inspect and hang the doors of freight cars and to cleat to the floor of the cars the "iron run" upon which trucks were rolled into and out of the cars, not a fellow servant with a truckman employed to load and unload freight into the cars within the meaning of article 4560h, Revised Statutes. Charge on negligence of defendant in failing to inspect a car door which fell and injured plaintiff held correct.

**2.—Ordinary Care—Duty to Inspect.**

A truckman injured by the falling of a car door was not required to use even ordinary care to discover whether a door was properly fastened where there was an inspector hired for this very duty.

**3.—Charge—Care in Inspection of Door—Accident.**

A charge that if defendant used ordinary care to furnish a safe fastening for a door, which fell and injured plaintiff, or had made such inspection of the fastening as an ordinarily prudent person would have made to find for defendant, being sufficient to cover the facts of this case it was not error to refuse a charge to find for defendant if the falling of the door was a mere accident.

Appeal from the District Court of Grayson. Tried below before Hon. Rice Maxey.

*Hayden W. Head* and *Head & Dillard*, for appellant.

*Wolfe & Hare*, for appellee.

FLY, ASSOCIATE JUSTICE.—Appellee sued appellant to recover damages arising from personal injuries alleged to have been inflicted through the negligence of appellant. Trial by jury resulted in a verdict and judgment for appellee in the sum of \$4000.

Appellee was in the employment of appellant as a truckman, or, in the language of the witnesses, a "trucker." It was his duty to haul freight to and from cars on a truck. On the day appellee was hurt he had gone into a freight car with a truck loaded with freight and was about the center of the car when a door fell from the top of the car and struck him on the back of the neck and back and knocked him senseless. He received serious and permanent injury and suffered great pain. The door which fell was an inside one and when a car was to be loaded or unloaded the inside or grain doors were fastened to the top of the car by hooks attached to the top which clasped into eyes on the doors.

The witnesses for appellee and those for appellant, including Ari Wilson, united in testifying that it was the duty of the latter, who is called a "cleater," or "sealer," to inspect the doors of freight cars and the fastenings thereon and to prepare the cars for truckmen to work in. He nailed the "cleats" to the floor of the cars to hold in place an appliance known as the "iron run" upon which trucks were rolled into and out of the cars. If the doors were out of fix it was his duty to repair



them; it was also his duty to fasten the inside doors to the tops of the cars and to see that the fastenings were secure. The duties of appellee were to take his truck into a car where it was loaded with freight by what is known as a "breaker," and then carry the load to the place indicated by the check clerk. There was not a particle of evidence that tended to show that appellee and Ari Wilson were fellow servants, but on the other hand the uncontroverted testimony showed that they were not fellow servants. It is true that Wilson swore that when the cars were high he got a truckman to assist him in fastening the inner doors to the top of the car, but he did not fasten the door that fell and injured appellee and no one had assisted him in and about his duties with the car in question. Whether it was high or low does not appear. The court did not err, therefore, in instructing the jury that the negligence of Wilson was that of appellant if the duty of inspecting the doors and fastenings thereof and preparing the car for the truckmen devolved on him. *International & G. N. Ry. Co. v. Kernan*, 78 Texas, 294.

The definition given in article 4560h, Revised Statutes, comprehends all employes of every person, receiver or corporation operating a railroad or street railway, and the requirements of that statute must be met in order to bring Wilson and appellee into the relation of fellow-servants. The testimony totally failed to meet the requirement of the statute in any respect. They were not in the same grade of employment, were not doing the same character of work, were not working together at the same time and place, and were not working to a common purpose. *Long v. Railway*, 94 Texas, 53.

Appellee was under no obligation to use even ordinary care to discover whether the door was properly fastened or not. He was authorized to assume that the inspector appointed by appellant had performed his duty and that the door was securely fastened. He did not know that the door was insecurely fastened and it was not his duty to exercise care to ascertain its condition. *Texas & N. O. Ry. Co. v. Bingle*, 91 Texas, 287; *Missouri K. & T. Ry. Co. v. Hannig*, 91 Texas, 351. It follows that the court did not err in refusing the special charge. It may be said, however, that the evidence did not tend to show that appellee by the exercise of ordinary care would have discovered the unsafe condition of the fastening of the door. If he had seen that it was fastened by a wire as testified by some of the witnesses, it would not have put him upon notice that it was not securely fastened.

The court instructed the jury that if appellant had used ordinary care to furnish a safe fastening or had made such inspection of the fastening as an ordinarily prudent person would have made to see that it was secure, to find for appellant. That charge covered the facts of the case, and it was not error to refuse a charge to the effect that if the falling of the door was a mere accident a verdict should be returned for appellant. If the inspector had done his duty he must necessarily have discovered the unsafe condition of a fastening which appellant contends a man upon whom no duty of inspection rested and who was



rolling a truck should have discovered. It was testified by witnesses for appellant that if the door had been properly fastened it could not have fallen.

There was no evidence as to when, where or by whom the door that fell was fastened to the top of the car, but if it had been fastened by a "breaker," it did not appear that he was a fellow servant of appellee while engaged in fastening the door. If he had been a fellow servant of appellee, it would not have precluded a recovery, because the proximate cause of the injury was not the improper manner in which the door was handled by the man who put it up, but the defective fastening and negligent inspection.

No question of assumed risk appears in the case and the court very properly refused a charge presenting that issue. There was no evidence indicating that appellant had adopted a method of fastening its inside doors in freight cars so that they would fall when a truckman entered the car, and nothing to show that the inspector was relieved from inspecting the fastening of the doors when he had not fastened them, and consequently appellee could not have gone into the car apprised of such ways of proceeding.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



them; it was also his duty to fasten the inside doors to the tops of the cars and to see that the fastenings were secure. The duties of appellee were to take his truck into a car where it was loaded with freight by what is known as a "breaker," and then carry the load to the place indicated by the check clerk. There was not a particle of evidence that tended to show that appellee and Ari Wilson were fellow servants, but on the other hand the uncontroverted testimony showed that they were not fellow servants. It is true that Wilson swore that when the cars were high he got a truckman to assist him in fastening the inner doors to the top of the car, but he did not fasten the door that fell and injured appellee and no one had assisted him in and about his duties with the car in question. Whether it was high or low does not appear. The court did not err, therefore, in instructing the jury that the negligence of Wilson was that of appellant if the duty of inspecting the doors and fastenings thereof and preparing the car for the truckmen devolved on him. *International & G. N. Ry. Co. v. Kernan*, 78 Texas, 294.

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The judgment is affirmed.

*Affirmed.*

Writ of error refused.



DARLINGTON-MILLER LUMBER COMPANY v. NATIONAL SURETY  
COMPANY ET. AL.

Decided March 31, 1904.

**1.—Garnishment—Surety Company—Deposit.**

Plaintiff, having a claim against a contractor, was not entitled to garnish a deposit which the contractor had made with a surety company as an indemnity for bonding him, where the amount which the surety company owed the contractor, after deducting commissions and attorney fees, was yet unsettled and not ascertainable.

**2.—Assignment of Deposit—Power of Attorney—Judgment.**

An assignment, by one claiming to be an attorney for a contractor, of a deposit with a surety company given as an indemnity for bonding him, to one to whom such contractor is indebted, held ineffective because the evidence supported a finding that no such power of attorney to assign was given and a finding to that effect would be involved in a general finding against the claim under the assignment.

Appeal from the District Court of Galveston. Tried below before Hon. Frank M. Spencer.

*James B. & Chas. J. Stubbs*, for appellant.

*Mart H. Royston*, for appellees.

PLEASANTS, ASSOCIATE JUSTICE.—In a suit by appellant against J. M. Archer & Son to recover an indebtedness of \$3650, upon the application of plaintiff a writ of garnishment was issued against the appellee, National Surety Company, on the 5th day of June, 1901.

The garnishee answered on the 17th day of October, 1901, that it had in its possession the sum of \$600 which had been deposited with it by the defendants J. M. Archer & Son for the purpose of protecting said garnishee against any loss or damage which it might sustain as surety for said defendants upon a bond executed by the defendants to the Gulf, Colorado & Santa Fe Railway Company to secure the faithful performance by defendants of a building contract wherein they had undertaken to construct a building for said railway in the city of Cleburne, Texas. The answer further shows that the liability of the garnishee upon said bond had not terminated and garnishee had not been released therefrom, and prays that garnishee be not required to turn over any portion of said \$600 until it shall have been released from all liability upon said bond.

On the 5th day of June, 1902, appellee Henry Hamilton intervened in this suit claiming the \$600 in the hands of the garnishee under an assignment thereof executed by J. M. Archer & Son, on March 30, 1901. The intervener also pleaded that the fund in the hands of garnishee was not subject to garnishment because at the time the writ was served upon the garnishee the liability of the garnishee to the defendants was conditional and uncertain. Intervener prayed that



the garnishment be dismissed and that he have judgment for the \$600 in the hands of the garnishee.

Plaintiff, by supplemental petition, joined issue by general denial and special pleading, alleging that on November 30, 1900, the defendants, J. M. Archer & Son, for a valuable consideration, made, executed and delivered to plaintiff an assignment and transfer of the \$600 held by the National Surety Company, the written assignment being set out in full in the pleading. Plaintiff further alleged that it notified the National Surety Company, through its agent, of said assignment on December 14, 1900, and that notice thereof was accepted by garnishee. That this \$600 had been deposited by J. M. Archer & Son, defendants, with the National Surety Company, the garnishee, for the purpose of securing and indemnifying the National Surety Company upon a bond executed by it as surety for J. M. Archer & Son. That the railway company has released the National Surety Company from further obligation on the bond and the \$600 held by the surety company is now due and payable to plaintiff. That by virtue of said transfer and assignment the National Surety Company holds the \$600 deposited by J. M. Archer & Son in trust for plaintiff.

The prayer is for recovery from the National Surety Company of said sum of \$600 under the transfer and assignment held and owned by plaintiff.

We deduce from the record the following conclusions of fact: In November, 1900, J. M. Archer & Son, who were then indebted to appellants, in order to obtain additional credit represented to appellants that they had on deposit with the garnishee herein the sum of \$600, which had been placed with said garnishee to protect it against loss as surety upon the bond of said Archer & Son which had been executed for the purpose stated in the answer of the garnishee before set out, and that as soon as they could have a settlement with the railway company, which they stated would be within the next few days, said \$600 would be released and they would pay the same over to appellants. Relying upon this representation and promise appellants gave additional credit to said Archer & Son to the extent of the value of two car loads of lumber. At the time appointed A. W. Miller, appellant's president, went to Dallas to collect the \$600 from the surety company. J. M. Archer, who was the senior member of his firm and had made the agreement with appellants, was not in Dallas, but the junior member of said firm was seen by Miller and stated that their attorney, Frank Pierce, had the matter in charge and would fix it up with appellant. Miller thereupon called upon Pierce and received from him the following instrument:

"Dallas, Texas, Nov. 30, 1900.—To F. B. Lord, Southern Agent, National Surety Company, Dallas, Texas: Dear Sir.—When the railroad company shall have released the bond which you gave on behalf of J. M. Archer & Son, for the construction of the Cleburne Young



Men's Christian Association building, please pay the \$600 (six hundred dollars) deposited by Archer & Son, as collateral security, to the Darlington Miller Lumber Company. This is in pursuance with my power of attorney heretofore filed with you. Very truly, Frank C. Pierce, Attorney for Archer & Son."

When it became necessary for J. M. Archer & Son to make the deposit with the surety company the intervener went with said J. M. Archer to a Dallas bank and executed with him to said bank a note for \$600 and secured from said bank a cashier's check for said sum. This check was indorsed to the surety company and the money collected thereon constituted the fund in controversy in this suit. When the note executed by Archer and the intervener to the bank became due it was paid by the intervener. In payment of the debt thus created J. M. Archer & Son executed and delivered to the intervener the following assignment of said deposit:

"Dallas, Texas, 30th March, 1901.—Crutcher Bros., Dallas, Texas: Gentlemen.—You will please pay to Henry Hamilton of Dallas, Texas, the six hundred dollars bond money you hold on the Y. M. C. A. job, Cleburne, Texas, from us. This shall be your receipt for same. Should you require further receipt, our attorney, Mr. F. C. Pierce, will attend to it, and oblige, truly yours, J. M. Archer & Son, by J. M. Archer."

At the time the writ of garnishment was issued there had been no settlement between J. M. Archer & Son and the railway company, and the proportion of said deposit, if any, which said Archer & Son was entitled to receive back from the surety company was uncertain and conditional. Prior to the trial in the court below the matter had been adjusted between Archer & Son and the railway company and the garnishee's claim upon said deposit released except as to \$100 thereof, which amount it was agreed the garnishee was entitled to hold as commissions and attorney's fees.

On June 16, 1902, prior to rendition of the judgment herein, appellant recovered a judgment against J. M. Archer & Son for \$3650, that being the full amount of indebtedness due it by said defendants. The affidavit in garnishment was made by A. W. Miller, president and manager for appellant. He testified that at the time he made the affidavit charging that the garnishee "was indebted to the defendants or had funds belonging to the defendants in its possession" he knew that the appellant had in its possession the assignment of the fund executed by Pierce as attorney for the defendant. The treasurer of the Gulf, Colorado & Santa Fe Railroad Company testified for plaintiff that during the year 1900 his company had several contracts with the defendants, and that in all matters pertaining to said contracts the defendants were represented by Frank Pierce as their attorney in fact. That said Pierce had a written power of attorney from defendants which was filed with the witness as treasurer of the railroad. That the paper



was lost, and though he had made diligent search therefor he was unable to find it.

The cause was tried in the court below without a jury, and upon the pleading and evidence above set out the trial court rendered a general judgment in favor of the intervener for \$500 and against plaintiffs for all costs of the proceedings; the garnishee being adjudged entitled to retain \$100 of the fund in its possession as commissions and attorneys fees in accordance with the agreement of the parties.

It is well settled that plaintiffs were not entitled to recover under their garnishment proceeding for the reason that the garnishee was not indebted to the defendant in any ascertainable amount at the time the writ was served and the answer of the garnishee filed. *Waples-Platter Gro. Co. v. Railway Co.*, 95 Texas, 486.

Appellant does not seek a reversal of the judgment upon the ground that it was entitled to recover against the garnishee as such, but insists that the evidence shows that it held a prior assignment of the fund and was therefore entitled to recover said fund against the intervener, who claimed under a subsequent assignment.

In answer to this contention appellee insists that appellant, by suing out his writ of garnishment and thereby seeking to reach the fund in the hands of the garnishee as the property of the defendants, abandoned its claim under the assignment, and is estopped from now asserting such claim. The cases of *Shattuck v. Smith*, 16 Vt., 132, and *Lawrence v. McKenzie*, 55 N. W. Rep., 505, seem to sustain appellee's proposition. We find it unnecessary, however, to decide this question, as we are of opinion that the judgment of the court below should be affirmed upon another ground. To entitle plaintiff to recover the burden was upon it to show that the assignment under which it claimed was executed by the authority of the defendants. There is evidence in the record which if standing alone would be sufficient to sustain a finding that Pierce was authorized by the defendants to execute the assignment, but when the entire evidence is considered the trial court was justified in finding that such authority had not been shown. The general judgment in favor of the intervener includes a finding that the plaintiff did not establish the validity of his assignment, and we think the evidence in the case is sufficient to sustain this finding.

We are of opinion that the judgment of the court below should be affirmed, and it is so ordered.

*Affirmed.*

ON MOTION FOR REHEARING.

PLEASANTS, ASSOCIATE JUSTICE.—In our opinion in this cause filed March 31, 1904, we state that the junior member of the firm of J. M. Archer & Son informed appellant's agent (Miller) that Frank Pierce was authorized to act for said firm in making the assignment to



appellant of the fund in controversy. This statement is not borne out by the record. When Miller went to Dallas to secure this assignment he did not see either member of the firm of J. M. Archer & Son. J. P. Archer, who stated to Miller that Pierce was authorized "to fix up the matter with him," was not a member of said firm, and it is not shown what connection, if any, he had therewith.

We adhere to our former conclusion that the evidence in this case is sufficient to sustain the finding of the trial court that the assignment under which appellant claims the fund in controversy was not executed by the authority of J. M. Archer & Son, and the motion for rehearing is overruled.

*Overruled.*



TEXAS & NEW ORLEANS RAILROAD COMPANY v.  
PLUMMER SMITH ET AL.

Decided March 31, 1904.

**1.—Heirs—Injury to Property—Burden of Proof.**

Plaintiffs suing, as heirs of their deceased parents, to recover damages for injury to property occurring before the death of the parents, could not recover the whole amount of the damages in the absence of proof that they are the sole heirs, nor any part thereof without showing what proportion of the whole damages they, as heirs, were entitled to recover, the burden of proof of the extent of their interest being upon plaintiffs.

**2.—Measure of Damages—Opinion Evidence—Market Value.**

The measure of damages for injury to a peach orchard was the difference between the market value of the land upon which the orchard was situated before and after such injury, and it was error to permit witnesses to give their opinion as to the market value of the land where the testimony showed that they were not acquainted with the market value of plaintiffs' land or of similar land with orchards thereon.

**3.—Tort—Injury to Property—Death—Survival of Action.**

A right of action for injury by trespass to the real property of a decedent during her life, being assignable, survived her death and could be maintained by her heirs.

Appeal from the District Court of Cherokee. Tried below before Hon. Tom C. Davis.

*Baker, Botts, Baker & Lovett and Willson, Box & Watkins*, for appellant.

*Campbell & McMeans and John F. Weeks*, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellees brought this suit against appellant to recover damages for injury to a peach orchard alleged to be the property of the plaintiffs and to have been injured through the negligence of appellant's employes in removing the fence inclosing said orchard and permitting stock to depredate thereon. The petition alleges that plaintiffs are the legal heirs of R. N. and J. E. Smith, deceased, and as such heirs are the owners of the premises upon which said orchard was situate. The trespass for which damages are sought to be recovered is alleged to have occurred in the fall of 1901, prior to the death of J. E. Smith, the mother of plaintiffs. Damages are claimed in the sum of \$2500.

The defendant answered by general demurrer and general denial, and specially excepted to that portion of the petition by which plaintiffs sought to recover damages as heirs of J. E. Smith, on the ground that the injury to the land and orchard alleged in the petition occurred prior to the death of J. E. Smith and the right of action for such damages did not survive and descend to her heirs, but abated upon her death. This exception was sustained by the trial court. The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiffs for \$300.



The appellees proved upon the trial that they were children and heirs of R. N. and J. E. Smith, deceased, who in their lifetime were the owners of the premises for injury to which damages were recovered in this suit, but the evidence does not show that appellees were the only heirs of said R. N. Smith. Upon this state of the evidence the appellant requested the trial court to instruct the jury to return a verdict for the defendant, and the first assignment of error is predicated upon the refusal of the court to give the requested instruction.

To entitle plaintiffs to recover damages for injury to the property it devolved upon them to show either that they were the sole owners of said property or that they owned a certain definite interest therein, and we think the evidence fails to meet this requirement. It is well settled that one tenant in common can not maintain an action to recover the entire damage done to the common estate. Where the petition shows upon its face that all of the cotenants are not joined in the suit, and such suit is for the recovery of the entire damage to the land, the question is properly raised by exception to the petition. If the petition is not subject to such exception the question may be raised by a plea in abatement or by an apportionment of the damages where the evidence shows what portion of the damage the plaintiffs are entitled to recover. *May v. Slade*, 24 Texas, 205; *Rowland v. Murphy*, 66 Texas, 534; *Naugher v. Patterson*, 9 Texas Civ. App., 168, 28 S. W. Rep., 582. In order to recover the entire damage to that portion of the injured property owned by R. N. Smith appellees must have shown they were the sole heirs of said Smith, and having failed to make this proof they were not entitled to recover said entire damage, and it did not devolve upon the defendant to plead or prove that appellees were not the sole heirs of said R. N. Smith. If the evidence had shown that the plaintiffs were not the sole heirs of said Smith and had further shown how many heirs the said Smith left, the plaintiffs would have been entitled to recover damages in proportion to the interest they inherited in the land, but having failed to show what interest they inherited in the land the evidence did not authorize a verdict in their favor for any amount. *Gayheart v. Sibley*, 66 S. W. Rep., 1041; *Trueheart v. Savings and Loan Co.*, 64 S. W. Rep., 1003. The burden was upon the plaintiffs to show not only that they were entitled to recover a portion of the damages to property, but also to show the extent of their interest.

The second, third and fourth assignments predicate error upon the ruling of the trial court in not sustaining defendant's objection to the evidence of witnesses for plaintiff who testified as to the value of the premises before and after the injury to the orchard. The ground of objection to this testimony was that the witnesses were permitted to give their opinion as to the market value of the land, when their testimony showed that they were not acquainted with the market value of same or the market value of land of like character in the vicinity of the land in question.



The evidence shows that the land in question had a market value both before and after the alleged injury to the orchard, and such being the case the proper measure of damages was the difference between the market value of the land before and after the injury to the orchard. This value could only be shown by witnesses who could say that they knew what it was, and the trial court erred in permitting witnesses who stated that they did not know what lands in the neighborhood of plaintiffs' land with peach orchards thereon had been or could be sold for, to express an opinion as to what such lands were worth. *Seattle & M. Ry. Co. v. Gilchrist*, 30 Pac. Rep., 738; *Sanford v. Shepard*, 14 Kan., 228.

In view of the disposition which will be made of this appeal because of the views above indicated, the remaining assignments presented in appellant's brief, which attack the verdict on the ground that it is grossly excessive in amount, will not be discussed.

Appellees by cross-assignment assail the ruling of the trial court in sustaining appellant's exception to that portion of the petition which seeks to recover the damages to the one-half interest in the land owned by their mother, Mrs. J. E. Smith.

The question raised by this assignment has not so far as we have been able to ascertain been directly passed upon by our Supreme Court. At common law all actions founded upon tortious injury to the person or property for which damages could be recovered abated upon the death of either the injured party or the wrongdoer, but by equitable constructions placed by the court upon the statute 4 Edward III, an executor or administrator was given the right to maintain a suit for injury to the personal estate of the decedent whereby such estate had become less beneficial to the executor or administrator. By the statute 3 and 4 William IV the executor or administrator was authorized to sue within a year after the death of the decedent for injury to his real estate caused within six months before his death.

The common law rule as to injuries to the person and many other actions sounding in tort has been changed by our statute, but this statute does not in terms apply to actions for injury to land. In the case of *Railway Co. v. Pfeuffer* the rule is announced that actions of this character can only be maintained by the person who owned the land at the time the injury was inflicted. In the case cited the injury for which damages were sought was not of a permanent character, but only an injury to the possession caused by a temporary trespass upon the land, and the party who brought the suit purchased the land subsequent to the trespass and did not purchase the right of action for the injury caused by the trespass. In all cases of this character it is clear that the cause of action remained in the person who owned the land at the time of its injury.

The general rule is that actions which may be assigned will also survive. It can not be doubted that Mrs. Smith could have assigned her



right of action for injury to her land and the assignee could have maintained a suit thereon. Such being the case we see no reason why the cause of action for such injury should not survive to her heirs. We are of opinion that the injury being to the property of the decedent the cause of action therefor became an asset of her estate and passed to her heirs. *Ferrill v. Mooney*, 33 Texas, 219; *Galveston H. & S. A. Ry. Co. v. Freeman*, 57 Texas, 156.

The judgment of the court below is reversed and the cause remanded for a new trial in accordance with the views above expressed.

*Reversed and remanded.*

Writ of error refused.



ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v.  
GEORGE ALLEN AND WIFE.

Decided March 31, 1904.

**Negligence—Failure to Give Signals—Discovered Peril.**

Evidence considered and held sufficient to support a verdict for \$1000 damages for the death of plaintiffs' child at a railway crossing caused by failure of defendant to give signals and to use every means in their power to prevent the injury after discovery of the perilous position of deceased.

Appeal from the District Court of Cherokee. Tried below before Hon. Tom C. Davis.

*E. B. Perkins and Marsh & McIlwaine*, for appellant.

*W. H. Shook and Shook & Bullock*, for appellees.

GARRETT, CHIEF JUSTICE.—This action was brought by George Allen and his wife against the St. Louis Southwestern Railway Company of Texas for the recovery of damages for the death of their minor daughter, Hattie Allen, which was alleged to have been caused by the negligence of the defendant. The grounds of negligence alleged in the petition were that at the place where the child was killed the public was accustomed to use the track, and the defendant ran its train at a reckless rate of speed without warning of its approach, and after having discovered the peril of the deceased it did not use every means in its power to avert the injury or lessen the danger. The defendant pleaded a general denial and contributory negligence. Trial by jury resulted in a judgment in favor of the plaintiffs for the sum of \$1000.

The deceased, Hattie Allen, was the daughter of the plaintiffs. On the 10th day of May, 1901, she was killed on the track of defendant's railway near Alto, in Cherokee County, by being struck by an engine drawing a passenger train. At the time of her death she was 9 years and 8 months old and of average intelligence for a child of her age. She was almost entirely deaf and dumb and had to be communicated with by signs. There was evidence, however, that she could hear loud noises as a steam whistle or an engine bell. The accident occurred at the south end of a bridge in the railway track which crossed overhead a neighborhood road along a branch. This road was used by the people of the neighborhood generally for vehicles, but people on foot used a path which deflected from the wagon road and went up the dump around the capsill of the bridge onto the bed of the railroad, which it followed a short distance and then crossed the track. This path had been used by the public ever since the railway was built without objection on the part of the defendant. The railway ran north and south through the farm of the plaintiffs, but the track was not fenced at the bridge. Plaintiffs' house is situated near the track on



the west side and a short distance southwest of the place where the accident occurred. On that day the child had left home and gone across the railroad to a duck's nest; and returning she followed the path going up the dump, and just as she stepped upon the ties near the south end of the bridge a passenger train running at the rate of twenty-five or thirty miles an hour ran against her and the pilot beam of the engine struck and killed her. No warning of the approach of the train was given. The whistle of the engine was not sounded and the bell was not rung. The child was seen by three witnesses as she approached and went onto the track. They all testified that she had her back to the train and was looking south. There was nothing in her conduct to indicate that she was conscious of its approach. One of the witnesses, Andrew Harrison, testified that he was going north on the track and had stepped off to let the train pass and was standing by the side of the track; that the child was looking at him as she came up the dump and walked towards the track and stepped on the end of the ties about four or five car lengths distant from him. She was seen also by the fireman on the engine and a passenger on the train. The fireman testified that he saw her as she came up the dump and that she stopped and he thought she was in the clear, but that she started across the track, when he grabbed the bell cord and halloed to the engineer and he applied the air. She was about 220 feet from the engine when the fireman first saw her. Nothing was done to stop the train or give warning until just as the child was struck. The train was stopped after striking the deceased in about the distance it had run before striking her after she was first discovered.

We are of opinion that the evidence required a submission of the case to the jury upon the acts of negligence alleged in the petition and that it was sufficient to support the verdict. The fireman saw that the deceased had her back to the direction from which the train was coming and was manifestly unconscious of its approach. He saw that she was about to go upon the track. It is true that he stated that she stopped and that he saw that she was in the clear, but he also saw that she was not aware of the presence of the train and made no effort, according to his own statement, to give any warning, and when she started again and stepped on the track it was too late to stop the train or prevent the injury. Thus according to the fireman's own testimony there was sufficient evidence both of negligence in failing to give any warning and of discovered peril to support the verdict. Even if the deceased or the plaintiffs had been guilty of contributory negligence yet the plaintiffs should recover on account of the failure of the fireman to give warning, after he had discovered the perilous situation of the deceased, by one of the means at hand by which the injury might have been averted even if it be conceded that the train could not have been



stopped. But the evidence offered by the plaintiffs was sufficient to sustain a finding that neither the plaintiffs nor the deceased were guilty of negligence. We do not think the charge as to proximate cause and contributory negligence is subject to the criticisms contained in the propositions under the seventh and eighth assignments of error.

The judgment of the court below will be affirmed.

*Affirmed.*



## CORA LINSON ET AL. V. MINNIE OLA POINDEXTER ET AL.

Decided March 31, 1904.

**Husband and Wife—Community Property.**

There being community debts at the time of the death of the wife, the husband had the right to sell community property for the purpose of paying such debts. The purchaser's title was good as against a claim for the land by the heirs of the wife, and he was not bound to see that the purchase money was applied to the payment of the community debts.

Appeal from the District Court of Leon. Tried below before Hon. J. M. Smither.

*Boyd & Edwards*, for appellants.

No briefs for appellees.

GARRETT, CHIEF JUSTICE.—Minnie Ola Poindexter joined by her husband, C. A. Poindexter, and Thos. A. Elgin, Jr., a minor, who sued by C. A. Poindexter as next friend, brought this suit as an action of trespass to try title against Cora Linson and others whose names are stated in the petition, for the recovery of one acre of land adjoining the town of Buffalo, in Leon County. The defendants pleaded not guilty and set up valuable improvements. The cause was submitted to the court without a jury and resulted in a judgment in favor of the plaintiffs for the recovery of the lot in controversy. The plaintiffs are the children and sole heirs of Mrs. Thos. A. Elgin, the first wife of Thos. A. Elgin, who died in March, 1890. After the death of his first wife Thos. A. Elgin married again, on July 21, 1890, his present wife, Roxana E. Elgin. The land in controversy was conveyed to Thos. A. Elgin during the lifetime of his first wife, the mother of plaintiffs, by T. S. Wilson and wife by deed dated January 15, 1890, which was duly acknowledged and recorded. It was the community property of the said Thos. A. Elgin and his first wife, the mother of plaintiffs, and at the time of her death was occupied by them as a homestead. After his second marriage the said Thos. A. Elgin and his present wife, Roxana, continued to occupy the lot as a homestead until February 15, 1892, when they conveyed the same to A. Richardson by their deed of that date duly acknowledged and recorded. A. Richardson and his wife are both dead and the defendants are their sole heirs. At the time of the death of Thos. A. Elgin's first wife he owed community debts for lumber and merchandise and for doctor's bills and burial expenses of his wife. The consideration received by Elgin from Richardson for the lot was \$60 in cash, a mule estimated at \$100, and Richardson's note for \$100. The note was sold to I. M. Pearlstone & Son, creditors of the community estate. There was some evidence that at the time Richardson bought he was advised not to buy the property, and that he remarked that he would not be out anything if he



got the rent for ten or twelve years. But it was not shown that he knew anything about Elgin's having had a former wife. He moved to Buffalo from Keechi station about January 1, 1901.

As survivor of the estate of himself and his deceased wife, there being community debts owing at the time of her death, Elgin had the power to sell the land in controversy for the purpose of paying such debts although the land was their homestead at the time of the wife's death. *Ashe v. Yungst*, 65 Texas, 631; *Watts v. Miller*, 76 Texas, 13. And the purchaser was not bound in his own protection to see that the purchase money was applied to the payment of the community debts, although in this instance it was shown that I. M. Pearlstone & Son, creditors of the community, purchased the note given for the lot. *Sanger Bros. v. Heirs of Moody*, 60 Texas, 96; *Cooper v. Horner*, 62 Texas, 363; *Cage v. Tucker's Heirs*, 37 S. W. Rep., 180. It is not necessary to pass upon the question of innocent purchaser. The plaintiffs should not have recovered the land, and the judgment of the court below will be reversed and judgment will be here rendered in favor of the defendants.

*Reversed and rendered.*



## HARRIS-HEARIN FOUNTAIN COMPANY v. W. X. PRESSLER.

Decided March 31, 1904.

**Written Contract—Parol Evidence to Vary.**

In suit on a written contract for the purchase of a sodawater fountain, which stipulated that the purchaser agreed not to countermand the order and if so the company should not recognize the same, it was error for the court to admit parol evidence that at the time of the sale it was verbally agreed between the parties that if, upon receipt of the fountain, it proved unsatisfactory to the purchaser, he need not accept it.

Appeal from the County Court of Nacogdoches. Tried below before Hon. Robert Berger.

*Ingraham, Middlebrook & Hodges*, for appellant.

No briefs for appellee.

GARRETT, CHIEF JUSTICE.—This suit was brought by the Harris-Hearin Fountain Company in a justice court in Nacogdoches County against W. X. Pressler to recover the price of a soda-water fountain purchased by the defendant from the plaintiff. The contract for the purchase of the fountain was in writing and certified that W. X. Pressler had purchased of Harris-Hearin Fountain Company one seven-bottle apparatus complete, etc., the consideration being \$150, to be paid 20 per cent on delivery of apparatus and balance in monthly payments of \$10 evidenced by notes drawing 6 per cent interest. That the said Pressler agreed not to countermand the above, and if so the company should not recognize same. The apparatus was to be shipped to Pressler f. o. b. Little Rock, Ark., not later than April 15, 1903. Date of contract was May 7, 1903. It was credited by tank not ordered \$30. The court below permitted the defendant to introduce evidence at the trial over the objection of the plaintiff that at the time of the sale of the fountain it was verbally agreed between the parties that when the defendant received the fountain if he was not satisfied with it he need not take it; and the defendant having testified that the fountain had been received at his store, but that he was dissatisfied with it, never set it up, and notified the plaintiff that he would not take it, the court rendered judgment in favor of the defendant. The court erred in receiving parol evidence to vary the terms of the written contract. The defendant was bound by the contract as written, and since the undisputed legal evidence shows that he is liable to the plaintiff for a breach of the contract to take the apparatus and make the payment and execute the notes as stipulated in the sum of \$120 with interest from May 7, 1903, at the rate of 6 per cent per annum, the judgment of the court below will be reversed and such judgment will be here rendered in favor of the plaintiff as should have been rendered by that court.

*Reversed and rendered.*



ORANGE COUNTY V. TEXAS & NEW ORLEANS RAILROAD  
COMPANY.

Decided April 1, 1904.

**1.—County Taxes—Collector—Tax Rolls—Payment.**

A county tax collector has no right to receive a payment of taxes before the tax rolls of the county have been turned over to him, although such tax rolls have been duly assessed and approved, and a county may recover from the taxpayer the amount of taxes so paid but not accounted for by the tax collector.

**2.—Same—Apparent Authority.**

The public must take notice of the actual authority of public officers and know that they can not bind the government beyond it.

Appeal from the District Court of Orange. Tried below before Hon. W. P. Nicks.

*Holland & Holland*, for appellant.

*Baker, Botts, Baker & Lovett* and *Chester, Crawford & Chester*, for appellee.

GILL, ASSOCIATE JUSTICE.—This is a suit by the county of Orange to recover of the Texas & New Orleans Railroad Company \$3809.94 due as taxes for the year 1898 on property owned and rendered by the railroad company in Orange County for one year. Defendant pleaded in bar of the action that the sum claimed had been paid by it on September 27, 1898, to Jeff D. Bland, the tax collector of plaintiff county. A trial before the court without a jury resulted in a judgment for defendant.

The taxes sued for were properly assessed, due and owing as alleged in the petition. On September 28, 1898, the amount was paid by defendant to Jeff D. Bland at Houston, Texas. Bland was at the time the duly elected, qualified and acting tax collector of plaintiff county and he executed to defendant a proper receipt therefor. The sum thus received by him was never paid over to the county. At the time of the payment the tax rolls of the county had not been turned over to him and were not in his hands. The assessment, however, had been duly made and the rolls passed on and approved by the board of equalization.

The trial court held in effect that the tax collector was the agent of the county for the collection of taxes from the time they are assessed and the rolls approved, and that his receipt executed for taxes collected after such assessment and approval but before the delivery of the rolls to him is binding on the county. This proposition is assailed by the plaintiff.

The question thus presented we have found some difficulty in determining. Such cases have rarely arisen and have usually assumed the form of an effort on the part of the government to hold the col-



lector's bondsmen responsible for the failure of the collector to account for the sum thus collected. The sureties on the official bond have almost invariably been held responsible, chiefly on the ground that the collector, having assumed to act officially, is estopped to deny the official nature of his act and the sureties are bound by the terms of the bond. *Cooley on Taxation*, 439, 1324, 1325, 1329, 1330; *Fuller v. Colkins*, 22 Iowa, 301; *Mast v. Nacogdoches County*, 71 Texas, 380.

Notwithstanding occasional expressions in the authorities to the effect that a collection prior to the receipt of the warrant is an official act, it is clear that the cases rest upon the same principle which precludes a surety on an official bond from questioning the validity or regularity of the appointment of his principal. *Cooley on Taxation*, 1337. In the cases holding otherwise the conclusion has been controlled by some provision in the bond limiting the sureties' liability to funds collected under formal warrant, which usually consists of the tax rolls duly approved and delivered to the collector, or of such rolls and a formal warrant duly signed by constituted authority. *Cooley on Taxation*, 793-1329. It does not follow, however, that because a county may ratify the act of the collector and elect to pursue its remedy upon the bond, that in the absence of such ratification and election the taxpayer is discharged. The question must be determined upon other grounds.

That the tax collector by virtue of his office is the agent of the county for the collection of all unpaid taxes duly imposed and for the collection of which there is an outstanding warrant is generally true. But that his authority must rest at last in some specific authorization can not be successfully questioned. That a tax collector who undertakes to enforce the collection of taxes prior to the receipt of his warrant is a trespasser and liable as such is well settled. It follows logically that his right to receive voluntary payments can not antedate such authority.

To hold otherwise would in effect empower the tax collector to receive payments far in advance of the approval of the rolls and would impose on the courts (there being no direct legislation on the subject) the duty to arbitrarily fix a time back of which such authority would not be recognized.

There are other considerations which lend strength to this conclusion. When the county through its collector receipts for a tax whereby the taxpayer is discharged, it releases the lien by which the tax was secured, and the personal liability of the taxpayer and the responsibility of the collector and his bondsmen are substituted therefor. The law therefore empowers the county to provide against the time when such sum shall be received from the collector by requiring bonds with reference to the amount expected to be received. In this State the fiscal years are kept separate and distinct.

It frequently happens that taxes imposed for one year are different in



amount and laid for different purposes than those of the previous year. The treasurer's books must be opened and kept accordingly.

It is the policy of the law that the imposition of taxes, their collection and disbursement should constitute a complete and harmonious system, and it follows that the taxes should not be receivable until preparation is completed for their custody and disbursement. The amount of the collector's bond is fixed at not less than the sum of the taxes collected for the previous year and maybe more, if prospective collections shall in the judgment of the commissioners require greater security. Rev. Stats., art. 5159.

If the necessity arises additional security may be demanded and the collector can not further discharge his official duties until further security is furnished. By article 920 the bond of the treasurer may be fixed by the commissioners court in an amount within their discretion, and by article 922 they may require of him new or additional bonds.

By article 5164 of the Revised Statutes collections shall begin on the 1st of October each year or so soon thereafter as the collector shall be able to obtain the proper assessment rolls, books or data upon which to proceed with the business.

In taking the precautionary course above mentioned the court would naturally act with reference to the time fixed by law for the receipt of the taxes which might render the increased security necessary.

It is plain, in view of these considerations, that to permit collections prior to the date fixed by law would enable the collector to forestall the commissioners court and become the custodian of funds for which no sufficient bond had been required. If they should be collected and held by him until the time fixed by law for their collection they would be held incidentally at the county's risk. If they were promptly paid over to the county treasurer the result would be the same. In either event the county might be cut off from the adoption of those precautions provided by law for its security. The case of *Cossart v. Spence*, 23 Ark., 374, supports the conclusion we have reached.

The judgment of the trial court can not be upheld on the ground that under the collector's apparent authority as the collecting officer the taxpayer was justified in paying the tax at any time after its levy. The rule that an agent ~~may~~ bind his principal by acts done within the apparent scope of his authority does not apply to public officers. However hard the rule may be in its application, the public must take notice of the actual authority of public officers and know they can not bind the government beyond it. *Whiteside v. United States*, 93 U. S., 247; *Mechem on Pub. Off.*, secs, 596, 512.

The facts being undisputed and the trial court having specifically found the amount of the taxes due for the year named, the judgment of the court below is reversed and judgment is here rendered in favor of appellant for the amount sued for.

*Reversed and rendered.*

Writ of error refused.



RED RIVER, TEXAS & SOUTHERN RAILWAY COMPANY v.  
L. L. DOOLEY.

Decided April 2, 1904.

**1.—Railroads—Killing Live Stock Running at Large in Violation of Statute.**

In an action against a railroad company for the killing of horses permitted by the owner to run at large in a county where the stock law prohibiting this was in force, it was error to admit evidence showing a defective condition of the fence inclosing the railroad right of way, since the duty of maintaining such fence is not, as to injury to stock, obligatory on the railroad company where stock are prohibited from running at large.

**2.—Same—Rule as to Negligence.**

In such case the railroad company can not be held liable for stock killed on the track except on proof showing negligence upon the part of its train operatives in failing to prevent the injury after the discovery of the animals on or dangerously near the track, or otherwise showing such gross negligence as would be tantamount to this, since the animals are trespassers under the circumstances and their bare presence on the track is negligence on the part of their owners.

**3.—Same—Animals Escaping from Owner.**

The fact that the animals escaped from the owner and were at large without his knowledge does not affect the case, since it was his duty to prevent their running at large.

Appeal from the County Court of Denton. Tried below before Hon. I. D. Ferguson.

*McReynolds & Hay and Head & Dillard*, for appellant.

*J. D. Cottrell*, for appellee.

SPEER, ASSOCIATE JUSTICE.—Appellee sued appellant to recover the sum of \$250 for the killing of two horses belonging to him. The negligence relied upon consisted of carelessness in the operation of the train of cars which killed said horses, defective stock gap or cattle-guard over which the animals entered, failure to keep a proper lookout to discover the stock upon the track, and lastly the failure to use the means at hand to prevent such killing after the animals were discovered upon the track. The appellant replied that if appellee's horses were killed by it they were running at large contrary to the stock law in force in Denton County, as provided by the Act of 1899. There was judgment for appellee in the sum of \$150.

We think the court erred in admitting the testimony of the witnesses Dooley, Smith and Walker, with reference to the condition of the stock gap on appellant's right of way, over which the animals in question are shown to have crossed immediately prior to the killing. In view of the undisputed fact that there is in force in Denton County the general stock law making it unlawful for appellee's horses to be allowed to run at large, such testimony was irrelevant and immaterial. Liability could not be predicated upon such negligence. Appellant can not be held liable for killing these horses upon the ground that it had failed to fence in its track within the meaning of the statute defining the lia-



bility of railroad companies for killing stock, because it is undisputed that appellant had fenced in its track at the point where such horses entered and were killed. The evidence indicates a want of ordinary care to keep such fence in repair, and if this were material in the present case the testimony above referred to would of course be proper. But we understand the rule to be in this State, that where stock not permitted by law to run at large go upon a railroad track which has been fenced in, and are there killed by a locomotive or cars of a railroad company, that such company can only be held liable in damages upon alleging and proving negligence upon the part of its train operatives in failing to prevent the injury after the discovery of the presence of such animals, on or dangerously near the track, or otherwise showing such gross negligence as would be tantamount to this. The duty devolves upon those operating a train of cars after discovering an animal in such place of danger to exercise a proper degree of care to prevent injury. But until such discovery we think they are authorized to presume that the owners of animals forbidden by law to run at large will not permit them to escape in violation of law and be found upon a railroad track. And because of the permitted indulgence of this presumption it is immaterial to inquire whether the operatives of the train exercised ordinary care to keep a lookout to discover such animals. In such place, under these circumstances, the animals are trespassers, and their bare presence is negligence upon the part of their owner. *International & G. N. Ry. Co. v. Cocke*, 64 Texas, 151; *International & G. N. Ry. Co. v. Dunham*, 68 Texas, 231; *Houston & T. C. Ry. Co. v. Jones*, 16 Texas Civ. App., 179, 40 S. W. Rep., 745; *Missouri K. & T. Ry. Co. v. Alley*, 32 Texas Civ. App., —, decided by this court May 16, 1903, and not yet reported.

We do not agree with appellee in his contention that the animals in question being at large without his knowledge would alter the rule as above announced. Under the terms of the stock law in force in Denton County (Acts of Leg., 1899, sec. 13, p. 202) it is declared to be "unlawful to permit to run at large" within said county any animals of the class to which appellee's belonged. This we construe to mean that it is the duty of the owners of such animals to prevent their running at large, and not merely that he is forbidden to knowingly permit their freedom. See *City of Paris v. Hale*, 13 Texas Civ. App., 386; *Evans v. Railway Co.*, 14 Texas Civ. App., 437, 37 S. W. Rep., 93; *Frazer v. Bedford*, 66 S. W. Rep., 573.

Since the pleadings and the evidence raise an issue which, according to the above discussion, would render appellant liable for failure to exercise ordinary care to prevent injuring appellee's horses after discovering their dangerous position, the judgment will be reversed for another trial.

*Reversed and remanded.*



CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY  
ET AL. V. C. H. BARRETT.

Decided April 2, 1904.

**1.—Carrier of Passengers—Degree of Care as to Depot Platform.**

Requested charges as to the degree of care required in keeping a depot platform in safe condition for use of passengers held sufficiently covered by the general charge. It seems that the high degree of care generally required of railroad companies to prevent injuries to their passengers applies as well to keeping their platforms and usual approaches to depots and cars in reasonably safe condition as to other incidents and instrumentalities of transportation.

**2.—Personal Injury—Charge—Excluding Effect of a Former Injury.**

Requested charges, in an action for injury resulting in a broken collar bone, excluding from the jury's consideration the effect of a former breaking of that bone, held sufficiently covered by the main charge.

**3.—Carrier of Passengers—Depot Platform—Charge.**

Where the court properly charged with reference to negligence in leaving a skid, over which plaintiff stumbled and fell, lying at night on a depot platform, such charge was not rendered inapplicable by the fact that a witness for defendant testified "that the skids and trucks were kept against the wall of the depot," no witness testifying that they were so placed on the night of plaintiff's injury, or that the skid was placed where found by any person for whose act in so doing defendant was not liable.

**4.—Personal Injury—Verdict Not Excessive.**

A verdict for \$2500 for injury resulting in a broken collar bone, with permanent injury to one shoulder, held not excessive.

Appeal from the District Court of Montague. Tried below before Hon. D. E. Barrett.

*N. H. Lassiter, Robt. Harrison and Jos. A. Graham, for appellants.*

*J. M. Chambers, Cham Jones, and J. H. Harper, for appellee.*

CONNER, CHIEF JUSTICE.—This suit was tried in the District Court of Montague County, on the plaintiff's amended original petition, wherein it was alleged that plaintiff resided in Grayson County, Texas, and that on November 1, 1902, he was a passenger from Ryan, I. T., to Forth Worth, Texas, over the defendant's line of railway; that he boarded the train at Ryan before daylight, at which place there was no night agent to sell him a ticket, and that when the train reached Terral, he alighted at the instance of the conductor to get a ticket. That it was then dark, and that the platform over which he was required to pass in order to reach the ticket office was unlighted; that defendants had negligently left on the platform certain skids, used for the purpose of loading and unloading freight, and that he stumbled and fell over these skids and suffered thereby certain personal injuries.

The defendants specially denied the allegation that the depot building and platform at Terral were not properly lighted, and averred that the skids were placed against the wall of the depot building at a place not frequented by passengers and at a place where they were not expected to be, and that if plaintiff stumbled over these skids it was the result of his own carelessness.



A verdict was returned in favor of the plaintiff and against the Chicago, Rock Island & Pacific Railway Company and the Chicago, Rock Island & Texas Railway Company for the sum of \$2500, from which verdict and the judgment thereon the two railroad companies have appealed to this court.

The testimony we think sufficiently supports the material allegations of appellee's petition, but error is assigned to the action of the court in refusing appellants' special charges numbers 4 and 5, to the effect that if the jury should find that the depot platform in question was at the time of appellee's injury "in a reasonably safe condition," or that appellants "exercised ordinary care to keep said platform in a reasonably safe condition for the purpose for which it was at the time maintained," they should return their verdict in appellants' favor. The court, after defining negligence as "the failure to exercise ordinary care," and ordinary care as "such care as a person of ordinary prudence would exercise under similar circumstances," charged the jury that appellants "were not held by the law as absolutely bound to keep their platform in a safe condition; they were only required to exercise ordinary care to keep it in a reasonably safe condition for the purposes for which it was used; and unless you find that the presence of said skid on said platform at the place it was when plaintiff stepped against it and fell, if he did so, was the result of a failure on the part of the defendants to exercise ordinary care to keep said platform in a reasonably safe condition for the purposes for which it was used, then you can not find that the defendants were guilty of negligence." "Unless you find from the evidence that the defendants were guilty of negligence by leaving said skid on the platform, and that such negligence was the cause of plaintiff's injury, if he was injured, you will find for defendant."

These charges, together with the usual charge on the burden of proof, we conclude sufficiently presented the theory of the requested charges, which indeed seem subject to the objection of embodying a rule of care not applicable in the case before us. That high degree of care generally required of railway companies to prevent injuries to their passengers would seem to apply, under the circumstances of this case, as well to keeping their platforms and usual approaches to depots and cars in reasonably safe condition as to other incidents and instrumentalities of transportation. *Gulf C. & S. F. Ry. Co. v. Butcher*, 83 Texas, 309; *Fort Worth & D. C. Ry. Co. v. Davis*, 4 Texas Civ. App., 351, 23 S. W. Rep., 737; *Stewart v. Railway Co.*, 53 Texas, 289; *San Antonio & A. P. Ry. Co. v. Turney*, 33 Texas Civ. App., —, 78 S. W. Rep., 256 (writ of error refused); *Missouri K. & T. Ry. Co. v. Mitchell*, 34 Texas Civ. App., —. If this view of the law be correct, but which we need not now authoritatively announce, it would follow that reversible error could not be predicated upon the action of the court in rejecting said special charges, even though the general charge



should be deemed insufficient in the particular under consideration, and notwithstanding the court's application of the less burdensome rule in its charge, of which also appellants are in no attitude to complain. The first and second assignments are accordingly overruled.

The principal immediate result of appellee's fall on the occasion here in question was a fracture of the left clavicle or collar bone, and on his cross-examination it was made to appear that the same bone had been broken some four or five months previously, as a result of which he had "laid off from work \* \* \* four or five weeks." Appellant hence sought by special charges numbers 10 and 11 to have the jury instructed to the effect that (using the language of appellants' proposition under the assignments complaining of the rejection of these charges), that they should not "include in their verdict any compensation for plaintiff's previous injury, with which the railway company had nothing to do." The jury, however, by the court's general charge were limited to damages proximately resulting from negligence by appellants, and in addition thereto the court gave the following specific instruction, viz: "If you find for plaintiff, you can only compensate him for such injury as he sustained, if any, by falling while on said platform. For any other injury that he has sustained the defendants are in no wise responsible, and you can not allow him anything therefor." It is thus made to appear, we think, that the charges given substantially embraced special instructions numbers 10 and 11, and that hence the fourth and fifth assignments should be overruled.

Among other things the court charged the jury that: "It is a question of fact for you to determine whether the leaving of said skid on said platform at the place it was when plaintiff stumbled over it and fell, if he did so, was negligence or not;" and "If you believe from the evidence that defendants were guilty of negligence in leaving said skid on the platform at the place where it was when plaintiff fell, if he did fall, etc., you will find for the plaintiff." It is insisted that the instructions here quoted are erroneous in that they assume that the skids over which appellee fell were by appellant left where found on the platform some distance from the wall of the depot building, whereas one of the appellants' witnesses testified "that the skids and trucks were kept against the wall of the depot." The witness, however, was evidently undertaking to state merely where the skids were usually kept. He did not testify that they were so placed on the night of appellee's injury, and there is not a particle of evidence indicating that the skids were placed where found by some person for whose act in so doing appellants are not liable. Besides, by whomsoever placed where found, it is undisputed that said skids were "left there" until appellee's fall, and the court manifestly but submitted the issue of whether appellant's were guilty of negligence in permitting the skids to remain in the position in which they were when appellee fell, and this we think it properly did in the charges under consideration, regardless of who so placed the skids.



The only remaining assignments attack the verdict as excessive. This contention is predicated upon evidence to the effect that appellee suffered from a previous injury and from a severe attack of rheumatism not resulting from the fracture of his collar bone, which was classed by the medical witnesses as an injury ordinarily easily healed. Appellee however testified to the effect that the injury upon which he relies pained him very much, and has continued to pain him ever since its infliction; that he can not rest well at night or lie on his left side; that his left shoulder, which was exhibited to the jury, has shrunk in size; that he has never been able to lift anything with his left arm since the injury; that it pains him to press upon his left shoulder blade, and that in moving his left arm back and forth, which is accompanied with pain, "there is a creaking noise in the shoulder which can be heard several feet away;" that while he had been suffering from rheumatism and heart trouble during several months preceding the trial he had prior thereto been in good health, having recovered from his previous injury, weighing from 230 to 235 pounds, whereas he now weighs 195 to 200 pounds; that he was 26 years old when hurt, and his services worth from \$40 to \$50 per month; that he had been unable to work, paid medical charges, etc. One of the physicians who first examined appellee after the injury testified among other things, that "In primary fractures there is usually no difficulty in union of the bone; in this case the bone having been previously fractured at the same point would render union more tardy and less certain. If the bone fails to unite there will be considerable impaired usefulness of the shoulder and arm. On account of this being the second fracture at this point, union will be less liable to occur. The question of permanent injury all depends upon the union of the bone, which if complete, the injury will be but slight." Another physician testified that he had examined appellee previous to his attack of rheumatism, for which he had been treating appellee, and found a fracture of the collar bone and "evidence of injury to the left scapula or shoulder blade;" that he could yet feel where the fractures were; that the "deltoid muscle had been knocked down. It was very sensitive. The bone had never properly united. From the condition the bone is now, and was at the time I examined him, there is perhaps a permanent injury."

There is no contention that appellee has been guilty of negligence in relation to the treatment of his injury, and while there is other evidence tending to show that it was a simple fracture of the collar bone and that his present condition of inability to labor, and as to pain, is attributable perhaps to rheumatism, yet it was the province of the jury to settle the conflicting tendency of the evidence and to determine the amount of the damages. As a whole we conclude that the evidence in behalf of appellee supports the verdict and judgment in all particulars.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.

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## J. T. LEWIS v. M. N. BATTEN.

Decided April 2, 1904.

**Pleading—Defect Cured by Verdict—Mutual Mistake.**

Where, in an action to correct a mistake in a division of land, plaintiff's petition alleged that the error was due to "some mistake, inadvertency, accident or miscalculation," a failure to allege that the mistake was mutual was cured by the verdict, and objection on that account could not be made for the first time on motion for new trial.

Appeal from the District Court of Eastland. Tried below before Hon. J. H. Calhoun.

*Scott & Brelsford*, for appellant.

*J. T. Hammonds*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—In the division of a quarter section of school land in Eastland County, between the parties to this litigation, a mistake was made which resulted in giving appellant eleven acres of land more than he was entitled to. This suit was brought by appellee to correct this mistake, and resulted in a judgment in his favor. The petition was defective in failing to allege that the mistake was mutual, but this defect was complained of for the first time in the motion for a new trial, and was therefore cured by the verdict, the petition alleging that the error in the conveyance sought to be corrected was due to "some mistake, inadvertency, accident or miscalculation," etc. This we construe to be a defective allegation of mutual mistake, and not a total failure to allege such mistake. In the case of *Horen v. Lang*, 11 Texas, 233, cited by appellant, the objection was made when the evidence was offered. In the following cases objection was held to come too late when made for the first time after verdict. *Murphy v. Still*, 43 Texas, 123, and *De Witt v. Miller*, 9 Texas, 239.

Errors are assigned to the charge, but as the evidence showed beyond dispute the fact of mutual mistake—the mistake evidently having been made through miscalculation by the surveyor who divided the land—the defects in the charge would not warrant a reversal of the judgment.

The judgment is therefore affirmed.

*Affirmed.*



## J. T. ADAMS V. J. N. WEAKLEY.

Decided April 2, 1904.

**1.—Charge—Ignoring Issue—Public Road—Telephone Line.**

Plaintiff's petition claimed damages for injuries resulting from a telephone line being permitted to hang too low across a first-class public road he was traveling, and defendant's answer having alleged that there was no public road at the place of the accident, plaintiff replied by supplemental petition that if the road was not a public county road it was one continuously traveled by the public; and the evidence showed that the injury occurred at a point where the road as traveled by the public deviated from its line as established by the commissioners court. Held, that it was error for the charge to ignore the issue thus raised and make plaintiff's right of recovery dependent on the road being a lawfully established first-class public road at the place of the accident, as the deviation of the road at that point was immaterial.

**2.—Same—Undue Prominence.**

A charge which repeatedly submits the issue of contributory negligence is erroneous as giving that matter undue prominence.

Appeal from the District Court of Jones. Tried below before Hon. H. R. Jones.

*C. H. Steele* and *James P. Stinson*, for appellant.

*L. H. McCrea* and *C. C. Ferrell*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—The wire of a telephone line belonging to appellee, which was hanging down across a public road in Jones County, struck the top of appellant's wagon frame, and by frightening the team of mules he was driving caused them to run away and throw him out, which resulted in the personal injuries made the basis of this suit.

In the amended original petition it was alleged that the road across which the wire was hanging was a public road of the first class between Anson and Stamford in Jones County. In the original answer, besides the general denial, it was specially pleaded that appellee's telephone line "was not situated across a public road at the time of the alleged injury, but that said line was situated across the open and uninclosed prairie country at a distance of two hundred yards or more from any public road." In the supplemental petition it was alleged "that if defendant's telephone line was not across the public road from Anson to Stamford when plaintiff came in contact with same, \* \* \* defendant negligently permitted and caused said telephone wire to come loose from a post to which it had been attached, and get down within about five feet of the ground across a road which was continuously traveled by the public leading from said town of Stamford in the direction of said town of Anson."

The issues so made by the pleadings were also raised by the evidence, that is, there was testimony tending to prove that the road as traveled by the public at the place of the accident deviated from the Stamford and Anson road as established by the commissioners court.



In submitting the case to the jury, both in the main charge and in two special charges given at the request of appellee, the court followed literally the allegations of the amended original petition, and, by rejecting appellant's second special charge, refused to submit the issue tendered by the answer and supplemental petition; and in thus making appellant's right to recover depend on whether he was traveling a lawfully established first-class public road at the place of the accident submitted the case to the jury on a false issue. The deviation of the road at that point was wholly immaterial.

The court also erred in repeatedly submitting to the jury the issue of contributory negligence. One clear and full submission of an issue is all that is required, and more is liable to give it undue prominence, as has been often held.

The definition of ordinary care given in the sixth paragraph of the charge has been more than once disapproved, as will be seen from an examination of the cases cited by appellant.

The issue of exemplary damages was not raised by the evidence and should not have been submitted, but no harm resulted from this error.

The judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*



## HARRY J. HATCH v. INEZ B. HATCH ET AL.

Decided April 2, 1904.

**1.—Life Insurance—Beneficiary Must Have Insurable Interest in Life of Insured.**

The beneficiary named in a life insurance policy, or an assignee thereof, must have an insurable interest in the life of the insured, and when such interest ceases, then interest in the policy terminates.

**2.—Same—Divorced Wife—Endowment Policy.**

A wife's interest in a policy on her husband's life ceases upon obtaining a decree of divorce, regardless of whether or not it was his fault that caused the divorce; and that the policy contained an endowment feature does not affect the matter, nor entitle the wife to the surrender value of the policy at the date of the divorce.

**3.—Same—Wife as Creditor—Lien.**

A creditor has an insurable interest in the life of the debtor, but only to the extent of the indebtedness. The wife having paid certain premiums on the policy out of her separate estate, was entitled, upon the divorce, to a lien on the policy for the amount of the premiums so paid.

**4.—Same—General Creditor Has No Lien on Policy.**

A moneyed judgment against the husband in the wife's favor in the divorce suit, rendered on matters in no way connected with or pertaining to the policy in her favor on the husband's life, gave her no right in or lien upon the policy as a creditor of the husband.

**5.—Same—Insurer Entitled to Cost and Attorney Fees.**

Where a husband assigned an endowment policy on his life to his wife, and was afterwards divorced from her, and brought suit on the policy against the insurance company, joining the wife, and the company answered that it was ready to comply with the contract of insurance as soon as it was properly determined who was the owner of the policy, it was entitled to recover its cost and attorney fees in the case and have the same made a lien on the policy.

Appeal from the District Court of Bowie. Tried below before Hon. J. M. Talbot.

*Todd & Armistead*, for appellant.

*Maurice E. Locke and Hodges & Moore*, for appellees.

RAINEY, CHIEF JUSTICE.—On January 11, 1889, the Penn Mutual Life Insurance Company, in consideration of certain annual premiums, issued to Harry J. Hatch a policy of insurance by the terms of which it promised to pay to said Hatch, his executors, administrators or assigns, \$10,000 on the 6th day of December, 1918 (any indebtedness to the company on account of said contract to be first deducted therefrom); or in the event of said Hatch's death before that time, said amount to be paid to Mary J. Hatch, his mother, if she survived him, otherwise to his administrators, executors or assigns. The said policy also stipulated, "The company will, while this policy is in force by payment of premiums, loan upon it as collateral security, after three years premiums have been paid thereon, an amount as per thirty-year endowment table printed on the back hereof," which amount for fifteen years was \$2250, according to said table. At the date of the issuance of said policy said Harry J. Hatch was unmarried, but thereafter, on August 28, 1889, he married



defendant, Inez B. Hatch. On June 30, 1890, Harry J. and Mary J. Hatch executed in duplicate an absolute assignment of all their right, title and interest whatever of and in the said policy of insurance to Inez B. Hatch. One copy of said assignment was then delivered to said Inez B. Hatch and the other to said insurance company. On October 1, 1902, Harry J. and Inez B. Hatch were divorced by a decree of the District Court of Bowie County, Texas.

On February 16, 1903, Mary J. Hatch, a feme sole, and Harry J. Hatch brought this suit against the Penn Mutual Life Insurance Company and Inez B. Hatch, alleging that all premiums on said policy had been paid; that they had made application for a loan of \$2000 on said policy in accordance with the terms of same, which application has been declined and refused by said company for the reason that Inez B. Hatch, the divorced wife of Harry J. Hatch, owned or claimed some interest in said policy and she had warned said company not to recognize plaintiffs or either of them as the owner of said policy; that said Inez B. Hatch has no interest in same, and her interest therein ceased when the decree of divorce was rendered.

Plaintiffs pray that Inez B. Hatch be adjudged not to have any interest in said policy, and that they have a writ of mandamus commanding said company to comply with its obligation to make a loan to plaintiffs of \$2000, or in default thereof for judgment for \$2000 as damages for breach of contract, etc.

Inez B. Hatch answered by general and special demurrers, general denial, and specially that after her marriage plaintiffs, on June 30, 1890, in writing assigned to her all their title and interest in said policy, and she ever since had owned same in her own separate right; that said company after said assignment recognized her as the owner; that said assignment was delivered into her possession and so remained until a short time before the divorce, when Harry J. Hatch obtained possession of said policy and said assignment and refuses to return same to her; that she, out of her own separate means, had paid three premiums on said policy, amounting in the aggregate to \$752.80; that Harry J. Hatch brought suit against her for divorce, in which she filed a cross-bill and judgment of divorce was rendered in her favor on account of wrongs done to her by him, and that in good conscience said divorce should not affect her right to said policy; that in said divorce suit she recovered a judgment against said Harry J. Hatch for \$1024.50, which is still subsisting, and she is a creditor of said Harry J. Hatch to the amount of same; that at the time of said divorce said policy had a surrender value of \$2380, and has a present cash surrender value of about \$2500, which was a vested right in her to that extent. She prays for affirmative relief; that she be decreed to be the owner of said policy, its earnings and benefits, and to quiet her title therein, and that same be decreed to be an asset of her separate estate as of date of the decree of divorce, and that the possession of said policy and assignment be surrendered to her, and prays in the alternative that if the



divorce affects her right to future earnings, etc., she be protected in her vested rights acquired in said policy before said decree and to protect her rights therein by reason of being a creditor of the insured.

The insurance company answered, in effect admitting the issuance of the policy as alleged; that Inez B. Hatch claimed an interest in the policy, and in response to plaintiffs' application for a loan it was refused unless Inez B. Hatch either released her interest or joined in the assignment; that it was ready, willing and able to comply with its contract to the true owner; that it was not acting in collusion with any of the parties, was ignorant of the merits of either of their respective claims, and asked that plaintiffs and Inez B. Hatch be required to interplead, and that the court adjust their respective rights so it may be protected in performing its contract, and also that it be allowed reasonable counsel fees in this behalf incurred, and to charge the same as a first lien upon said policy, and for general relief.

Plaintiffs by supplemental petition alleged that in the decree of divorce the property rights of Inez B. Hatch were adjudicated and said decree was *res adjudicata* as to her claim to said policy, etc.

Inez B. Hatch, in answer to said supplemental petition, plead that the matters here in issue were not in issue in said divorce proceedings and could not have been properly in issue, as same was her separate property, etc.

On a trial before the court without a jury judgment was rendered that plaintiff take nothing of defendant, and that defendant recover costs and attorney's fees; that Inez B. Hatch's insurable interest ceased by reason of the decree of divorce, but that up to that time she had acquired a vested right in the policy to the extent of its surrender value, and as both Harry J. Hatch and Inez B. Hatch had an interest in said policy, directed the same to be placed in the hands of W. R. Grim, as trustee, to hold the same for their use and benefit. Plaintiffs appeal, and Inez B. Hatch files a cross-assignment of errors.

It is contended by appellant that upon the divorce of Inez B. Hatch from Harry J. Hatch her insurable interest in the life of said Harry J. Hatch ceased and thereby her interest in the insurance policy terminated, while appellee Inez B. Hatch contends that the policy having been assigned to her during her marriage relation with the said Harry J. Hatch and same containing an endowment feature, she became vested with the sole ownership and entitled to the benefits thereof.

Whatever may be the rule prevailing in other jurisdictions the rule in this State is that the beneficiary named in the policy, or an assignee thereof, to be entitled to hold an interest therein must have an insurable interest in the life of the insured, and when such insurable interest ceases then interest in the policy terminates. *Cheeves v. Anders*, 87 Texas, 287. A creditor has an insurable interest in the life of his debtor, but only to the extent of the indebtedness. If the amount of the policy exceeds the amount of the indebtedness plus the amount he expends to preserve the policy with interest thereon, as to



the excess he is only trustee for those entitled to receive it. *Cheeves v. Anders*, *supra*.

A wife's interest in a policy on her husband's life ceases upon obtaining a decree of divorce, and it is immaterial whether or not it was his fault that caused the divorce. *Schonfield v. Turner*, 75 Texas, 324. When the decree of divorce was rendered the insurable interest of Inez B. Hatch in the life of Harry J. Hatch ceased and her rights in the policy terminated, except in so far as she had paid premiums. The endowment feature of the policy we do not think affects the question. In *Mayher v. Insurance Co.*, 87 Texas, 169, it is held that no distinction is to be drawn between this character of policy and that of one running for life. Inez B. Hatch, after the divorce, had no interest in the continuance of the life of Harry J. Hatch, but did have an interest in his death, provided she still remained owner of the policy, and this our decisions hold to be against public policy. Under the terms of the policy the endowment was not payable if the insured lived until 1918, and the burden of paying annual premiums existed, and it would be to her interest that his death occur at the earliest period, and the same reason applies if she should be entitled to the surrender value of the policy as adjudged by the trial court.

The only consideration for the assignment of the policy to Inez B. Hatch was the fact that she was the wife of Harry J. Hatch, and when that relation ceased she ought not in law or equity to be entitled to hold the policy, especially as against Mary J. Hatch, except to the extent of premiums paid by her. While holding the policy she paid the following premiums: \$250 in 1890, \$251.40 in 1896, and \$251 in 1901, for which she is entitled to judgment with 6 per cent interest from the dates the respective amounts were paid, and is entitled to a lien on the policy to secure the payment of same.

The trial court rightfully held that the judgment in the divorce proceedings was not *res adjudicata* of her rights asserted here. The policy had been assigned to her, and she had the right to hold the same until said amounts were paid to her. This matter was not in issue in the divorce proceeding, nor was it adjudicated in said proceeding. Nor did the court err in holding that the judgment in the divorce proceeding in her favor for a certain amount, the same still subsisting, gave her any [no] right in or lien upon the policy. The moneyed judgment was on account of matters in no way connected with or pertaining to said policy.

The court erred in holding that Inez B. Hatch had an interest in the policy to the extent of \$2380, surrender value of the policy, and in appointing a receiver to hold said policy for the benefit of the parties. We think under the circumstances the insurance company should be treated as a mere stakeholder, and entitled to its costs and attorney's fees.

Inez B. Hatch being entitled to a lien on the policy for premiums paid, plaintiffs are not entitled to recover of the insurance company



unless her claim is satisfied, or she consents to the loan as stipulated in the policy.

The judgment will be reversed and rendered as follows: Inez B. Hatch to recover the amount of premiums paid by her, with interest as above stated, with a lien on said policy, which policy is to be delivered into her possession as security for same, and to be surrendered by her upon the payment to her of her said lien. The defendant insurance company to recover \$250 attorney's fees, and costs, to be a lien on the policy, subject to the lien of said Inez B. Hatch, and that plaintiffs take nothing and pay the costs.

*Reformed and rendered.*

ON REHEARING.

The judgment of this court heretofore rendered is reformed so as to allow Harry J. Hatch the possession of the policy upon the payment of the liens thereon, and as he has reduced the judgment of the lower court he is entitled to the costs of this appeal, and same are taxed against Inez B. Hatch. As to the insurance company the judgment is reformed so that a first lien on the policy is given it for the payment of its attorney's fees.

The motion of Inez B. Hatch for rehearing is overruled.

*Ordered accordingly.*

Writ of error refused.



## J. R. GARNER V. J. D. RISINGER.

Decided April 4, 1904.

**1.—Deposition—Answer to Cross-Interrogatory.**

Answer to cross-interrogatory as to extent of witness' habit of using narcotics held sufficient to justify refusal of motion to quash the deposition for failure of the witness to answer.

**2.—Deed—Delivery—Innocent Purchaser.**

A deed never delivered nor placed on record by the grantor is ineffectual to protect an innocent purchaser from a grantee who had, without the maker's knowledge or consent, taken possession of it and had it recorded.

**3.—Deed—Delivery—Intention—Evidence.**

Evidence held to support the conclusion that an acknowledged deed retained in the grantor's possession was not intended to take effect without manual delivery.

**4.—Deed—Delivery—Estoppel—Negligence.**

Evidence held to support a finding against estoppel of a grantor, as against an innocent purchaser from grantee, to deny delivery of a deed by reason of his negligence in keeping it, the acknowledged instrument having been placed in a drawer in the home of the grantor of which the grantee was an inmate, and surreptitiously taken therefrom and placed on record by the grantee.

Appeal from the District Court of Red River. Tried below before Hon. Ben. H. Denton.

*W. S. Thomas and J. S. Patrick*, for appellant.

*Chambers, Doak & Kennedy*, for appellee.

**KEY, ASSOCIATE JUSTICE.**—This is a suit to cancel a deed and to remove cloud from title, resulting in a judgment for the plaintiff, and J. R. Garner, one of the defendants, has appealed. The trial judge held the following conclusions of fact and law:

"1. I find from the admissions of plaintiff and defendants that on the 19th day of October, 1901, the title to the land described in the plaintiff's petition was in the plaintiff.

"2. I find that since the institution of this suit one of the plaintiffs, to wit, Lucy G. Risinger, has died, and that she willed all of her interest in the land described in the plaintiff's petition to the plaintiff, J. D. Risinger, and that said will has been duly and legally probated.

"3. I find from the evidence that on the 19th day of October, 1901, plaintiff J. D. Risinger and Lucy G. Risinger made a deed to the land described in the plaintiff's petition to the defendant Minnie Q. White; that the consideration specified in said deed was \$600; that nothing was paid by the said Minnie Q. White for said land and that said deed was never delivered to her by the said J. D. Risinger nor Lucy G. Risinger, nor with their consent, and that said deed was taken out of their possession without their knowledge or consent by Minnie Q. White, and that the same was by her filed for record in the county clerk's office of Red River County, Texas, on the 3d day of January, 1902.

"4. I find that on the 15th day of January, 1902, the defendant



**Minnie Q. White** sold said land to the defendant **James R. Garner** for the sum of \$600, which was paid by him, and that at the time he bought said land and paid for the same, he did not know that said deed from **J. D. Risinger** and wife to the defendant **Minnie Q. White** had never been delivered to her, and had no notice of the trouble between them.

"5. I find that ever since said deed from **J. D. Risinger** and wife to **Minnie Q. White** purports to have been made, the plaintiff and his tenants have been in the possession of the land, and have paid all taxes thereon, and that neither of the defendants have ever been in possession of said land, or paid any taxes thereon. I therefore conclude, as a question of law, that said deed never having been delivered by the plaintiffs to the defendant **Minnie Q. White**, nor to anyone else for her, no title was passed or has ever passed from the plaintiffs and that the defendant **Garner** got no title by reason of his purchase from the defendant **Minnie Q. White**.

"I therefore find for the plaintiff against both of the defendants for the cancellation of the deed from **J. D. Risinger** and wife to **Minnie Q. White**, and for plaintiff for the land described in plaintiff's petition, and for costs of suit."

*Opinion.*—1. The first assignment is addressed to the action of the court in overruling the motion to suppress the deposition of **Lucy G. Risinger**, upon the ground that the witness had refused to answer a cross-interrogatory, wherein she was asked to state how long, how often and what kind of narcotics she had been taking. The witness' answer was: "I am sick and have been since October, 1901, and have not been able to wait on myself, and have suffered all the time. I take chloral when I am suffering intense pain." We think the answer was responsive to the question, and that no error was committed in overruling the motion referred to.

2. The deed never having been delivered nor placed on record by the grantors, the defendant **Garner** was not entitled to protection as an innocent purchaser. The deed was as ineffectual to pass title or protect a purchaser from **Minnie Q. White** as it would have been if the names of the grantors had been forged. Delivery is an essential part of the deed, and until it is delivered no title passes to the person named therein as vendee.

3. It is earnestly insisted that the testimony shows that the deed in question was delivered to **Minnie Q. White**, although there was no manual delivery, and **J. D. Risinger**, one of the grantors, retained it in his possession until it was surreptitiously obtained by **Minnie Q. White**, without the consent of either grantor. This contention is based upon the testimony of the grantors to the effect that the deed was prepared and signed because they had minor children, and desired to place the title to the property in such condition that the surviving spouse could hold and transfer the property without reference to the minor children. The contention is that the testimony referred to man-



ifests the purpose of the grantors that the instrument should become effective without manual delivery, and that in law such purpose is equivalent to a manual delivery. Conceding the correctness of the proposition of law asserted by appellant, we do not think he is entitled to a reversal on the point under consideration. J. D. Risinger testified further: "I just intended to hold that deed, so that in the event of the death of my wife, she [meaning Minnie Q. White] could make me another deed, and I could have them both put on record at the same time, and if she would do it there would be no harm done and we could destroy the deed." This testimony indicates that it was not the purpose of J. D. Risinger that the deed should immediately become operative, and supports the finding of the court that the deed was not delivered.

4. We do not think the court erred, as contended by appellant, in failing to find for him on the issue of estoppel. J. D. Risinger put the deed in a drawer in an organ, where he kept his private papers in his residence. It is true that Minnie Q. White was an inmate of his home, but she was his stepdaughter, and there is nothing in the testimony to indicate that he had any reason to suppose that she would attempt, without permission, to obtain possession of the deed. We do not think the court erred in failing to find that J. D. Risinger was guilty of negligence in keeping the deed at the place and in the manner referred to, and the plea of estoppel is based upon the theory of negligence.

No reversible error has been shown and the judgment is affirmed.

*Affirmed.*

Writ of error refused June 23, 1904.



B. J. VARNER V. JENNIE VARNER.

Decided April 6, 1904.

**1.—Divorce—Refusal of Marital Rights.**

The wife's continued denial to the husband of the privilege of sexual intercourse, can not, alone, furnish ground for divorce, unless under conditions rendering it insupportable cruelty.

**2.—Judgment—Presumptions.**

In the absence of a statement of facts, all facts necessary to support the findings and judgment of the trial court will be presumed, on appeal, to have been proven.

Appeal from the District Court of Limestone. Tried below before Hon. L. B. Cobb.

*J. B. Kimball*, for appellant.

No briefs or appearance for appellee.

**KEY, ASSOCIATE JUSTICE.**—Appellant brought this suit against appellee for the purpose of obtaining a divorce from the bonds of matrimony, and from a judgment against him he has appealed. The grounds relied on in his petition are stated as follows: "That plaintiff was married to defendant in January, 1901, and that they lived together until February, 1902, when she finally abandoned him. During their said married life, plaintiff treated defendant with kindness and consideration; that defendant, though a strong and robust woman, never permitted plaintiff to engage in the sexual embrace with her long before she abandoned him as aforesaid, and perpetually denied him this right, her only reason being, as she alleged, that she did not intend to again become a mother. That defendant persisted in the course and refused to accede to plaintiff's request."

The statute of this State, in prescribing the grounds upon which a divorce may be granted, does not specify either impotence or refusal to submit to sexual intercourse. However, it authorizes a divorce when either husband or wife is guilty of "excesses, cruel treatment, or outrages toward the other, if such ill treatment is of such a nature as to render their living together insupportable." In the case now under consideration, the petition does not charge that the conduct of the defendant was an excess, cruel treatment or outrage, nor that it was of such a nature as to render their living together insupportable; and it may be that the divorce was properly refused on account of the failure of the plaintiff to make those essential averments in his petition. But if it be conceded that the petition was sufficient, we are of opinion, for reasons hereafter stated, that no reversible error is shown.

There is no statement of facts in the record, but the trial judge filed findings of fact to the effect that the averments in the plaintiff's petition, as set out above, were true. After finding the facts as alleged



by the plaintiff, the court held "that the refusal of defendant to accede to plaintiff's solicitations was not an excess, cruel treatment or outrage of such nature as to render their living together insupportable to plaintiff." It is stated in the American and English Encyclopedia of Law, second edition, volume 9, page 793, that "the persistent and unjustifiable refusal of marital rights may constitute cruelty, if sufficient to injure the health, but in no case has such injury been established. The refusal of either party to occupy the same bed is not cruelty under any definition of that term." But if it be conceded that a case might be presented in which refusal to grant sexual intercourse would constitute such cruel treatment as would authorize a divorce under our statute, we do not think the record before us discloses such a case. In our opinion, the effect that such refusal would have upon a husband would depend in a large degree upon his physical condition, as well as upon the condition of the wife.

The finding of the court that the defendant refused to accede to the plaintiff's requests carries with it the inference that plaintiff solicited sexual intercourse, and the fact that he made such solicitation is all there is in the record indicating the plaintiff's physical condition.

The rule is that in the absence of a statement of facts, or a finding of the court or jury to the contrary, it will be presumed that proof was made of all facts necessary to sustain the judgment. So, in this case, it may have been shown, concerning the plaintiff, that his "Way of life has fallen into the sear, the yellow leaf." Old age and infirmity may be upon him; his virility may be greatly diminished; his amorous desires may be few and feeble, and the failure to have them gratified a matter of no great importance. And if such be his condition, whatever might be held as to a husband differently situated, we are of opinion that the trial court did not err in holding in this case that the wife's conduct, though wrongful, was not such an excess, cruel treatment or outrage as to render their living together insupportable. No error is shown and the judgment is affirmed.

*Affirmed.*



J. SAUNDERS v. MISSOURI, KANSAS & TEXAS RAILWAY  
COMPANY OF TEXAS.

Decided April 6, 1904.

**Contributory Negligence—Perilous Position—Charge.**

A charge that one injured by his team running away, alarmed through negligence of a railway, could not recover "if, after the team became frightened, the plaintiff could have dismounted from the wagon with safety, and if, under the circumstances, a man of ordinary prudence would have dismounted," was erroneous because ignoring the effect of imminent peril in preventing prudent conduct.

Appeal from the District Court of Bell. Tried below before Hon. John M. Furman.

*Hill & Whiteley* and *John B. Durrett*, for appellant.

*T. S. Miller* and *Geo. W. Tyler*, for appellee.

**KEY, ASSOCIATE JUSTICE.**—Appellant brought this suit against appellee to recover damages for personal injuries. Appellant and another man were engaged in hauling baled hay, and the team they were driving became frightened, ran away and threw appellant from the wagon, thereby causing the injuries complained of.

The plaintiff in his petition charged the defendant with negligence in running an engine at a high rate of speed, and in unnecessarily blowing the whistle on the engine, thereby frightening the team and causing them to run away.

The defendant in its answer charged the plaintiff with contributory negligence in loading the wagon, in riding on top of the same, and in not getting off the wagon when the mules became frightened.

The trial in the court below resulted in favor of the defendant, and the plaintiff has appealed, assigning error upon the charge of the court. The court charged the jury in effect that if, after the team became frightened, the plaintiff could have dismounted from the wagon with safety; and if, under the circumstances, a man of ordinary prudence would have dismounted, the plaintiff was not entitled to recover.

This charge is objected to on the ground that it ignored and eliminated the question of imminent peril. The objection is well taken. The rule is that when one person is placed in a perilous position by the wrongful act of another, the person so situated is not required to exercise the same degree of care that a person of ordinary prudence would have exercised. *International & G. N. Ry. Co. v. Neff*, 87 Texas, 303, 28 S. W. Rep., 283; *Jackson v. Galveston H. & S. A. Ry. Co.*, 90 Texas, 372, 38 S. W. Rep., 745; *Missouri K. & T. Ry. Co. v. Rogers*, 91 Texas, 52; 40 S. W. Rep., 956; *Bryant v. International & G. N. Ry. Co.*, 19 Texas Civ. App., 88, 46 S. W. Rep., 82; *Houston & T. C. Ry. Co. v. Byrd*, 61 S. W. Rep., 149; *Gulf C. & S. F. Ry. Co. v. Bryant*, 66 S. W. Rep., 807.



There was testimony tending to show that the defendant was guilty of negligence which frightened the team, and that the plaintiff was thereby placed in a perilous situation; and the charge of the court on contributory negligence should have been so framed as not to have placed it in conflict with the rule referred to, as announced in the cases cited.

The other criticisms urged against the charge are not regarded as well taken.

For the error pointed out, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



AMERICAN MUTUAL BUILDING AND SAVINGS ASSOCIATION V.  
E. J. CORNIBE ET AL.

Decided April 6, 1904.

**1.—Usury—Loan—Building Contract.**

Pleading held to show a contract, in form one for the construction of a house at a fixed price, to be in effect an usurious contract for the loan of money; and evidence held to support a finding of the facts so pleaded. *Matthews v. Texas B. and L. Assn.*, 48 S. W. Rep., 744, distinguished.

**2.—Agency—Evidence.**

Testimony of plaintiff as to transactions concerning the making of a contract with one whose name he did not know, held admissible, the circumstances showing that such unknown was recognized by defendant as its agent in the matter.

**3.—Building Association—Cancellation of Stock—General Relief.**

In an action to cancel a lien on the ground of usury in the contract and discharge of the debt by payments, plaintiff could have cancellation of stock certificates, issued to him by the defendant building association as a part of the transaction sought to be set aside, under his prayer for general relief.

Appeal from the District Court of McLennan. Tried below before Hon. Marshall Surratt.

*J. B. Scarborough*, for appellant.

*Waller S. Baker*, for appellee.

EIDSON, ASSOCIATE JUSTICE.—This suit was brought by appellees to cancel a lien held by the appellant upon certain real estate of appellees, and to declare the debt to secure which said lien was given usurious, and to remove cloud from appellees' title to said property, and for such other and further relief as they may be entitled to, in law or equity.

Appellant answered by general and special demurrers, general denial, special answer and cross-action for the foreclosure of the lien claimed by it on the property described in appellees' petition.

The trial was before the court without a jury, which resulted in a judgment for appellees, declaring the contract usurious, and finding that appellees had paid \$470.90 of the principal of the loan of \$500, and gave judgment for appellant for the balance of \$29.10, with a decree foreclosing its lien upon the land described in appellees' petition; and appellees, having tendered payment of said balance, costs were adjudged against appellant. And the court also decreed cancellation of the certificates of stock issued to appellees by appellant.

Appellant's special demurrer set up, in substance, that said petition declared upon a contract for the construction of a house at a fixed price, and not on a contract for the loan of money.

It appears from the record that the court sustained both the general and special demurrers of appellant, and that the appellant filed a trial amendment, to which appellant urged the same demurrers, which were



overruled by the court; and this action of the court is the basis of appellant's first and second assigned errors.

We think the court properly overruled appellant's demurrers general and special, as the original petition of appellees, aided by their trial amendment, clearly alleged sufficient facts to show a loan of \$500 by appellant to appellees; and that the issuance of stock in appellant's association to appellees, and the taking of appellees' note for the sum of \$714, to be paid in monthly installments of \$8.40 each, and the contract to pay \$2.50 monthly as interest, constituted a scheme and device by which appellant intended to collect from appellees usurious interest. *Cotton States Building Co. v. Reily*, 50 S. W. Rep., 961.

It appears from a bill of exceptions of appellant that the court below, over objections of appellant, permitted the plaintiff, E. J. Cornibe, to testify that an old gentleman, whose name he did not recollect, approached him (witness) to make the loan for appellant, and that the old gentleman was the organizer of the company (appellant) in Waco, and with whom, in connection with J. R. Railey, all the negotiations which led up to and included the making of the contract on the part of and for the appellant were had. The statements made by the old gentleman were made to plaintiff first, and then plaintiff and the old gentleman and J. R. Railey talked the matter over.

It reasonably appears from this testimony that the old gentleman was the agent of appellant; and it further appears that after talking to this old gentleman, plaintiff, the old gentleman and Railey, whom the proof clearly shows was the agent of the appellant, talked the matter over; and as the bill does not show differently, the legitimate inference would be that the same matters were talked over in the presence of Railey.

We think there was no error in the admission of the above testimony; nor was there any error in the admissions of the certificates of stock, as it was proper for the court to receive evidences of the entire transaction, the issuance of such certificates being a part thereof.

In our opinion the evidence amply sustains the conclusions of the court below that the contract was usurious. The facts in this case are clearly distinguishable from those in *Matthews v. B. and L. Assn.*, 48 S. W. Rep., 744, cited by appellant, in which the evidence showed that there was no agreement to lend money, but both parties understood the contract to be a contract to build for an agreed price, and not a contract to lend and borrow.

It was not error for the court to decree a cancellation of the certificates of stock issued by appellant to appellees, their issuance being a part of the usurious transaction, and the court was authorized to decree their cancellation under appellees' general prayer for other and further legal and equitable relief.

We have carefully considered all the assignments of errors of appellant, and finding no reversible error in the record, the judgment is affirmed.

*Affirmed.*

Writ of error refused June 23, 1904.



TEXAS & PACIFIC RAILWAY COMPANY V. TEXAS SHORT LINE  
RAILROAD COMPANY.

Decided April 6, 1904.

**Interstate Commerce—Railway—Bailee—Rates—Contract—Public Policy.**

The Texas Short Line Railroad Company which had, in building its road into Grand Saline, contracted with a salt company there for the transportation of 66 per cent of such salt company's product to any points on connecting lines, undertaking to meet any rate offered by other connections, having accepted a shipment at a rate published by the Texas & Pacific road and its connections to the destination in another State, routing same over its own line and the Missouri, Kansas & Texas Railway, there being no published through rate by such route, and the sum of the local rates thereon exceeding the rates charged, tendered the shipment to the Texas & Pacific road at the latter's published through rate and on refusal to accept it sued for the difference it was compelled to pay in shipping over the Missouri, Kansas & Texas and its connections. Held:

(1) The defendant was not justified in refusing the shipment by the requirement of the interstate commerce law that it should transport for no less nor greater amount than its published rates.

(2) The Short Line company, as bailee of the property under its contract, had the same right as the manufacturer to demand the transportation of the property by defendant for it at the latter's published through rate without transporting it over any part of its own line, though having no agreement with defendant for such through rate.

(3) The contract between the Short Line company and the salt company was not void as against public policy.

(4) The Short Line company was not obliged to publish the through rates made by other companies in order to avail itself of them in shipping over their lines, nor compelled to accept the sum of the locals instead of their published through rate.

(5) The fact that the salt was tendered in cars of other companies gave defendant no right to refuse the shipment, its right being to load into its own if it wished to avoid the mileage charge on foreign cars.

(6) The unlawfulness of plaintiff's shipment over the Missouri, Kansas & Texas and its connections, without a published through rate and at less than the sum of locals by that route could not justify defendant's refusal to transport at its own published rate which compelled plaintiff to adopt that route.

Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*T. J. Freeman and Hall, Flippin & McCormick*, for appellant.

*McCormick & Spence*, for appellee.

JAMES, CHIEF JUSTICE.—This action was brought by the Texas Short Line Railway Company to recover damages sustained by reason of the Texas & Pacific Railway Company refusing to accept for transportation from Grand Saline, Texas, to New Orleans, La., and New Iberia, La., certain carloads of salt, at the rate published by the latter for such service, the damages sued for consisting of what plaintiff had to pay to have the salt transported between such points over another route. Defendant filed a general denial, except as to matters which it admitted.

It pleaded specially, admitting that it published the rate for salt as alleged, the tender of the salt and tender of the published rate as alleged,



and that it refused the cars first on bills of lading of plaintiff and afterwards on bills of lading of defendant.

In other respects the material part of defendant's pleading (section 3 of the answer) consists of (1) an allegation that said tariff applied only to salt tendered by the manufacturers or owners of salt and not to other carriers. (2) That plaintiff had no interest in the salt except as a common carrier to whom it had been delivered for transportation, that the owner of the salt was the Lone Star Salt Company, at Grand Saline, which company, instead of delivering the salt to defendant, delivered it to plaintiff, the Texas Short Line Company; that the Texas Short Line Company had no published tariff or rates in effect between it and defendant from Grand Saline to said points, and in accepting said freight at the tariffs published by this defendant it committed an unlawful act in that it accepted same for less than the regular tariff rate and was guilty of discrimination and of giving rebates; that the Lone Star Salt Company had the right to route its freight as it saw proper and could have delivered same direct to this defendant, as its industry was located on its track, and could have availed itself of defendant's published rate; but not having done so, it was required by law to pay a rate based on the sums of the locals applicable to the Texas Short Line Company from Grand Saline to said points, and that in attempting to deliver this freight to this defendant plaintiff was trying to evade the law, and was doing so for the purpose of preventing this defendant from receiving its legitimate share of the salt shipped by the Lone Star Salt Company at Grand Saline. (3) An allegation that the salt was tendered in foreign cars, when defendant had ample cars of its own in which to carry said salt, for the use of which defendant would have to pay a per diem charge while in its control. It also alleged a contract between the Lone Star Salt Company and the Texas Short Line Company, whereby the former had agreed to turn over to the latter for shipment two-thirds of its output of salt from Grand Saline, which the latter's manager is enforcing, and for this reason it is attempting to accept shipments to points reached by other lines than its own, and at a rate which gives it no revenue at all, the sole purpose being to deprive this defendant of its just revenue from the business of the Lone Star Salt Company, and to prevent it from coming into competition in any way with the Texas Short Line Company as to said business, and for this reason accepts the shipments at a rate which applies only via the Texas & Pacific Railway Company and not in connection with the Texas Short Line Company, and for this reason is willing to give this defendant the entire rate plus a switching charge, the purpose being to enable plaintiff to carry out a contract that deprives defendant of its right as a common carrier to obtain business of an industry located on its line.

Defendant further says that, being a common carrier, it is not deprived of its rights to protect its business legitimately, and to meet all lawful competition; that to force this defendant to accept this freight



tendered it by the Texas Short Line Railway Company upon the theory that the Texas Short Line Railway Company was the owner of the freight, would, in effect, be making this defendant a party to the contract made by the Texas Short Line Railway Company and the Lone Star Salt Company, and would prevent this defendant from competing for a commodity, and for the business of an industry located directly upon its track, and would make it an aider and abettor in carrying out a contract unlawful in itself, and would be against the business interests of this defendant; that the plaintiff herein has no right to tender this freight to this defendant upon the same terms and conditions as it would be tendered to this defendant by the owner or manufacturer of same; that the Texas Short Line Railway Company is not enabled to carry out its contract with the Lone Star Salt Company as to this class of freight, destined to the points mentioned, and this defendant should not be forced to furnish the means for carrying out a contract unlawful in itself, tendered upon an unlawful rate, and the carrying out of which would seriously impair and affect the revenue of this defendant, and prevent it from competing for business that it is legitimately entitled to.

Defendant expressly denies that it has refused to receive from the plaintiff herein any freight that it would be required to receive as a connecting carrier, under the law. It expressly denies that the Texas Short Line Railway Company had any interest in the freight tendered by it to this defendant; it expressly denies that the Lone Star Salt Company has ever tendered it any freight to be forwarded, and tendered at the same time the legal rates and charges upon the same. It further states that the owner and manufacturer of said salt could have delivered same to this defendant, and same would have been carried upon the regular published rates of this defendant, without any delay or discrimination.

It further avers that the Texas Short Line Railway Company has accepted the freight mentioned in its petition upon an unlawful rate, and for this defendant to accept same, upon prepaid charges advanced to it, would make it a party to such unlawful transaction. It further avers that it would be inequitable, unjust and unlawful for it to be forced to accept said freight, and thus be required to furnish a competitor an advantage that would practically cut off all competition as between this defendant and said competitor for the business at Grand Saline.

It further states that under the allegations of plaintiff's petition, plaintiff has not been deprived of any revenue by the refusal on the part of this defendant to accept and forward said freight, when if this defendant had received same, upon the rate as tendered to it, it would have been guilty of an unlawful act, and its revenue would have been seriously impaired, and its right to receive said business direct would practically be taken away from it.

To this part of defendant's pleading plaintiff demurred upon the ground that such matters constituted no defense, which demurrer was sustained. Plaintiff in its supplemental petition alleged further that by



contract with the owner of the salt mentioned plaintiff had, before said salt was tendered defendant, become bound to transport said salt to its point of destination and to transport all salt tendered by said owner for transportation, which said contract covered a large amount of tonnage and was for many years and is of great value to plaintiff, and under said contract plaintiff became the bailee of the salt tendered to defendant and was in possession thereof as such bailee when same was tendered to defendant. A demurrer by defendant to the above was overruled.

After the evidence, the court directed the jury to return a verdict in favor of plaintiff for a certain sum, and there is nothing questioning the amount, if the judgment be otherwise correct.

The testimony introduced was undisputed. The parties are common carriers at Grand Saline. The Texas & Pacific Railway, it seems, runs to New Orleans, La., and does not run to New Iberia, La., but has a connection in Louisiana with that point. Its rate on salt shipments from Grand Saline to said points, as alleged by plaintiff, was published and in force at the dates these shipments, together with such rate, were offered on defendant's bill of lading and refused. The Texas Short Line Railway Company is, as its name imports, a short line running out of Grand Saline, and connecting with other line or lines. A contract was shown between the Lone Star Salt Company and one Henry M. Strong, which, after reciting that the former had salt works of great value located at Grand Saline, Texas, which produced and shipped large quantities of salt by rail and is in direct competition with other salt works which have the benefit of several railways at point of origin, and that only one railway was in existence at Grand Saline, which is detrimental to its interests and embarrassed it in its competition in many ways, and that the party of the second part, Mr. Strong, and his associates contemplate another line of railway into Grand Saline which will afford the Lone Star Salt Company an additional outlet for its product, provided said party of the second part can be assured for a definite time of a sufficient revenue to warrant the construction of said line, binds the Lone Star Salt Company to furnish said party of the second part or his assigns for transportation for the term of twenty-six years, and for renewals thereof, 66 per cent of all tonnage moved by rail from its works, said term to begin when the line shall be open for traffic to a point of intersection with some line of existing railway other than the Texas & Pacific Railway. In consideration whereof the party of the second part agreed to carry all such freight and to make to the company on same the lowest rate made, quoted or given by any common carrier or carriers between points, so that the company shall never be compelled to pay more freight to the second party, or his assigns, for any service than it would have to pay for the same service to any other carrier or carriers.

It was also shown that the Lone Star Salt Company delivered the cars of salt in question to the Texas Short Line Railway Company at Grand



Saline, and gave them the same rate as that published by the Texas & Pacific Railway Company from Grand Saline to the points named, and issued its bill or bills of lading to the Lone Star Salt Company for same which routed the shipment via the Texas Short Line Company and the Missouri, Kansas & Texas Railway Company. The cars were all Missouri, Kansas & Texas cars except one Texas & Pacific Railway car. Instead of sending same as routed in the bill, plaintiff at Grand Saline tendered the cars to the Texas & Pacific Railway Company for shipment as aforesaid.

The first error assigned is the court's action in sustaining the demurrer to the third section of said answer.

The third assignment complains of the refusal of a charge requested by defendant directing a verdict in favor of defendant on the evidence.

Under these assignments appellant presents certain propositions. One is: "The act of Congress regulating commerce between the various States requires carriers engaged in such traffic to establish and publish a schedule of rates, and makes it unlawful for any carrier to charge, demand or collect any greater or less compensation for transportation than specified. Had appellant and connecting lines knowingly entered into the contract in question, whereby less was charged than specified, they would have incurred severe penalties; and if appellant had collected different rates from those specified, it would have been as guilty as if it had made the contract."

The above seems to have reference to appellant's schedule of rates, and the sufficient answer to it would seem to be that appellant was not asked to carry this freight for more or for less than its scheduled rate.

Another proposition is: That under the interstate commerce act two kinds or classes of rates are mentioned: Single line rates, to wit, rates of a single carrier upon its route, and joint rates, being rates over routes of several carriers. That joint line rates can be legally made and established only by agreement between the carriers, and the published rate must so specify and show, and that where joint through rates are not established by agreement between connecting carriers the only lawful rate between the carriers would be a combination of locals, which may consist of a through rate published by one carrier plus the local rate of the other carrier. Another proposition is that an interstate rate from a given point to a given point must either be a joint through rate legally made, filed and published, or a combination of the local rates, and unless it is a joint through rate or a combination of locals, neither rate would be a lawful rate.

These propositions seem to be aimed at the rate charged the Lone Star Salt Company by appellee. The argument is that as appellee had no agreement with appellant for a joint rate to the points named, and hence had no such published tariff in connection with it, if this shipment was to move over appellant's line to said points, the only lawful rate upon which it could move would be a combination of locals. In other words the contention is that the Lone Star Salt Company could have



shipped this salt over appellant's line at the published tariff, but appellee could not. We can not recognize a distinction against appellee which is based on the necessity of a joint through rate with appellant, for the reason that such a rate could exist only by agreement and appellant was not required to make any agreement in the subject with appellee, and from the position it takes here, it naturally would enter into no agreement of the kind. Besides there was no need of an agreement between them for a joint through rate for the amount published, if appellee was entitled to avail itself of appellant's rate as any other person. The rate was unquestionably open to all persons having freight between said points, without discrimination. Unless, therefore, there existed some special reason why appellee was incapacitated from shipping the freight, or appellant from accepting it, the latter was not justified in rejecting it. The mere fact that the Texas Short Line Railway Company had no agreement with appellant for a particular rate as a joint through rate, was no reason for refusing its own rate when it was the latter's established rate for that service.

The following charges were refused and are presented as propositions:

"You are instructed that the plaintiff herein had no interest as bailee, or otherwise than as a common carrier, in the shipments of salt tendered by the Lone Star Salt Company and set out in its petition herein; that in receiving said salt it was required by law to charge the shipper the legal rate for transporting same; that the undisputed evidence shows that the plaintiff had no regularly published tariffs on salt from Grand Saline to the points where said shipments of salt were destined, and that under this state of facts it was obliged to charge a combination of the local rates, which was in excess of the amount it did charge. And you are further instructed that the defendant herein was not obliged to receive said shipments, except upon a prepayment of the legal rates."

"If you find and believe, therefore, that the defendant herein was not tendered the lawful rate upon said shipments, you will find for the defendant."

"You are instructed that the contract between the plaintiff herein and the Lone Star Salt Company, by which said Lone Star Salt Company obligates itself to give to said plaintiff two-thirds of its entire output, is void as contrary to public policy, and that it vested in the plaintiff herein no right in any shipment of salt tendered it for transportation as a common carrier; that the plaintiff herein by virtue of its charter as a railway company only exercises the rights vested in a railway company, and that said contract did not vest it with any rights not already possessed by it as a railway company, and when salt was delivered to it, it was delivered to it as a common carrier, and as a common carrier it was governed by all the rates, rules and regulations governing the movement of freight, State and interstate; that when it received the shipments of salt mentioned herein from the Lone Star Salt Company, it was required to charge said company the legal rate, and if it failed or refused to do so it was guilty of a crime, under the law, and the



defendant herein was not obliged or required to protect said unlawful transaction, or to transport the freight mentioned herein upon such unlawful rate, and if you find it did refuse to transport same upon an unlawful rate, you will find for the defendant."

The Texas Short Line Railway Company, so far as appears, had no agreement with connecting carriers for a joint rate to the points in question, and therefore had no such rate to publish. The points were not on its line. It was probably obliged to charge a combination of rates to such points when it carried the freight over its own line and over connecting lines. Here it was not necessary to charge a combination of rates, as the Texas and Pacific Railway started from Grand Saline and was a common carrier, and it was only necessary for appellee to charge the salt company the rate fixed by that line if it could send the salt over that line. This it attempted to do, and the tender it made to the Texas and Pacific Railway Company was the prepayment of the legal rate.

Appellant does not undertake to explain wherein the contract between appellee and the salt company was illegal or void as contrary to public policy, and we perceive no reason why in itself it was not a valid contract. This being so, appellee had an interest to protect in resorting to the rate offered the public by the appellant from Grand Saline.

There is nothing of a substantial nature in any of the grounds upon which appellant defends its refusal to carry the freight. If all the cars had been cars of other companies, and appellant would, as it pleaded, have had to pay a charge for them while on its lines, it could nevertheless have transferred the salt to its own cars, of which they allege they had an ample number. The contention that the published rate was available only to individuals and producers of salt and not to carriers offering salt is untenable. The fact that appellee gave the salt company a bill of lading routing the shipment over its own line and over the Missouri, Kansas & Texas Railway at the Texas & Pacific rate, when the combination of locals over that route was greater than such rate, might, if the shipment had been carried out according to the bill of lading, have exposed appellee to penalties, but this, we think, furnished no legal reason for appellant's refusal to carry the salt when tendered to it. Appellant could have violated no law in accepting this freight at its published rate. There was no basis for appellee having to tender the Texas & Pacific Railway Company any combination of rates, when it published a rate of its own for the particular service. The fact that appellee made no haul of this freight over its own line, so as to be in the usual position of a connecting carrier, it seems to us, makes no difference. It had become the bailee of the salt, charged with the duty of transporting it to the points named, and a deviation in the routing was a matter which might have concerned it and the salt company, but not appellant. It was enough that the salt was tendered to appellant upon its bill of lading and its published rate, the salt being in appellee's hands as its custodian for the purposes of its transportation to said points.



We utterly fail to see justice in appellant's contentions. It admits that it would have had to carry the salt at the rate tendered, if it had been offered by the salt company direct. As far as its compensation or its traffic was concerned the result to it was the same whether offered by the one or the other. It received the business. The manifest motive of the refusal was to drive its only competing line at Grand Saline to resort to other connections, involving a combination of local rates, and thereby render the latter incapable of performing its contract with the salt company. Appellant having established a lower rate than the salt could have been taken to said points over other lines, appellee was by its contract with the salt company required to carry it at that lower rate, and this it could only do over appellant's line. The natural result of appellant's establishment of such rate and its refusal to receive salt from appellee, would be to embarrass and destroy the latter. In our opinion there was nothing shown in defendant's answer nor in the testimony which warranted it in rejecting the shipment. Whatever the situation may have been between appellee and the Lone Star Salt Company as to the legality of their contract arrangement and the bill of lading issued to the latter, appellee was in fact custodian of the salt for the purposes of its shipment to New Orleans and New Iberia, and appellant's duty was to carry it when regularly tendered.

It is true appellee caused the salt to be transported over the Missouri, Kansas & Texas Railway as routed in its bill of lading to the salt company, and the rate it charged was less than the combination of locals over that route. But appellee did not do this until after tendering it to appellant and appellant had refused it. This refusal was the occasion of appellee sending the salt over the other route. Appellant, it seems to us, is in no position under these circumstances to set up this act of the appellee as a justification for its refusing to accept the shipment.

*Affirmed.*

Writ of error refused.



JACK FLYNN ET UX. V. HARRIET HANCOCK.

Decided April 6, 1904.

**1.—Insane Person—Guardianship—Jurisdiction—Residence.**

The fact that an insane person is confined in an asylum situated in another county than the one in which her estate is situated does not deprive the latter county of its jurisdiction in matters of guardianship of her estate, her residence still remaining in such county. Rev. Stats., art. 2566.

**2.—Lunatic—Guardian—County Court.**

A county court has the authority to appoint a guardian for a lunatic on its own motion. Rev. Stats., arts. 2574, 2742.

**3.—Same—Homestead.**

The detention of a lunatic in an asylum, being involuntary on her part, does not affect the homestead character of her estate.

**4.—Guardian—Lunatic—Suit.**

Suit for property of a lunatic was properly brought in her name by her guardian.

Appeal from the County Court of Lamar. Tried below before Hon. Ben. H. Denton.

*J. R. G. Long and Hodges & Moore*, for appellants.

*Moore, Park & Birmingham*, for appellee.

FLY, ASSOCIATE JUSTICE.—This is an action of trespass to try title to a parcel of land in the city of Paris, Texas, instituted by appellee, a lunatic, through her guardian, J. P. Morris, against Jack Flynn and his wife, Alice Flynn. Appellants answered by general denial and a plea of not guilty, and specially pleaded that they had purchased the land from Jerry Hancock, Claude Hancock and Ulric Hancock, and claimed only to the extent of the interest that their vendors had in the land, which was one-half of it.

The cause was tried by the court and judgment rendered in favor of appellee for the land and \$48 for use of it, it being specially provided in the decree that appellants were not divested thereby of any title they might have to the land, and that appellants should not be precluded from setting up the value of their improvements in any suit to try title to the land or to partition the same.

It appears from the statement of facts that about 1893 Jerry Hancock, Sr., died, leaving surviving him his wife Harriet and their two children, Claude and Ulric, and Jerry Hancock, Jr., an illegitimate son. At the time of the death of the senior Jerry Hancock, he and his wife were occupying the property in controversy as their homestead, and she, with her minor children, Claude and Ulric, continued to occupy it as their homestead until February 24, 1899, when Harriet Hancock was adjudged a lunatic and was confined in the asylum for the insane at Terrell, Texas. The Hancocks are negroes, Claude and Ulric



being respectively 19 and 16 years of age. On March 15, 1902, Dr. J. P. Morris was appointed the guardian of the estate of Harriet Hancock, the judgment of the county court reciting that she was a lunatic and a citizen of Lamar County.

After Harriet was confined in the lunatic asylum, Jack Flynn procured a deed to the premises in controversy to his wife from the illegitimate son of Jerry Hancock, deceased, and the two minors, and made improvements on the property.

There is no merit whatever in the first assignment of error. The fact that Harriet Hancock was confined in an asylum situated in another county than Lamar did not deprive the latter county of its jurisdiction in matters of guardianship of her estate. She was not deprived, by being placed in the asylum, of her residence in Lamar County, within the purview of article 2566, Revised Statutes.

While it does not appear, as contended by appellants, that the county court appointed the guardian of the estate of Harriet Hancock without an application having been made therefor, still the court had the authority to appoint a guardian on its own motion. In article 2574, Revised Statutes, it is provided that whenever it shall come to the knowledge of the county judge that a minor in his county is without a guardian of his person or estate, he shall institute proceedings to appoint such guardian, and in article 2742 it is provided that all provisions relating to the guardianship of the persons and estates of minors shall apply to the guardianships of the persons and estates of persons of unsound mind and habitual drunkards, when not inconsistent with the latter classes. The judgment could not be attacked as a collateral proceeding.

After the death of her husband Harriet Hancock elected to use and occupy the property in controversy as her homestead and it was not subject to partition. Revised Statutes, art. 2057. The detention of Harriet Hancock in the lunatic asylum did not affect the homestead character of the premises. The detention was not voluntary on her part, and without a voluntary abandonment upon the part of the survivor the status of the homestead would not be disturbed. *Foreman v. Meroney*, 62 Texas, 723; *Hall v. Fields*, 81 Texas, 553. It would be inhuman and cruel in the extreme to deprive an insane person of the homestead on account of involuntary absence from it brought about through the intervention of the State. The case of *Shields v. Aultman*, 20 Texas Civ. App., 345, cited by appellants, does not sustain any such doctrine, and neither do we believe that it would find countenance in any civilized country. The case cited merely holds that the husband can abandon and sell a homestead without the consent of a wife hopelessly insane. That is a far different proposition from the one involved in this cause.

There is no merit in the fourth assignment of error, which states that the suit was prosecuted by and the judgment rendered for the lunatic,



and not in the name of the guardian. The suit was prosecuted by the guardian of Harriet Hancock. In the original petition it is recited that "Harriet Hancock, of unsound mind, who sues by her duly appointed and qualified guardian, J. P. Morris," brought the suit. The judgment was that "Harriet Hancock, of unsound mind, by her guardian J. P. Morris, do have and recover," etc.

The judgment is affirmed.

*Affirmed.*



## M. A. BEAN ET AL. v. H. H. BENNETT.

Decided April 7, 1904.

**Power of Attorney—Presumption.**

Though a power of attorney was on record which was not in itself sufficient to empower the attorney to sell land, still such power will be presumed in favor of an ancient deed by the attorney where the grantor lived for over forty years after the sale and often declined to bring suit for the land.

Appeal from the District Court of Houston. Tried below before Hon. John Young Gooch.

*Aldrich & Crook*, for appellants.

*Adams & Adams*, for appellees.

GARRETT, CHIEF JUSTICE.—This was an action of trespass to try title brought by M. A. Bean and others to recover of the defendants John Carlisle and others about 1000 acres of the P. E. Bean league situated in Houston County. The plaintiffs sue as the heirs of Isaac T. Bean, who was the heir of the original grantee, Pedro Elias or Ellis P. Bean. The defendants pleaded not guilty and limitation of three, five and ten years; also facts to show that Isaac T. Bean and the plaintiffs as his heirs were estopped from asserting title to the land. The cause was submitted to the court without a jury and judgment was rendered in favor of the defendants; and also in favor of the defendant John Carlisle on his plea in reconvention for the recovery of 553½ acres fully described therein.

As a matter of historical interest it may be stated that the original grantee, P. E. or Pedro Elias Bean, was a colonel in the Mexican army and is the subject of the memoirs of Ellis P. Bean, printed as an appendix to volume 1 of Yoakum's History of Texas. The plaintiffs de-raigned title from P. E. Bean through his son Isaac T. Bean, and would be entitled to recover unless the defendants have established their plea of limitation or have shown an outstanding title through a conveyance of the land by Isaac T. Bean by his attorney in fact, William Y. Lacy, to David Snively. In order to show title in themselves by regular chain the defendants offered and introduced the following evidence: (1) A certified copy of a deed from Isaac T. Bean by William Y. Lacy, agent and attorney, dated April 3, 1856, recorded in Cherokee County April 8, 1856, and recorded in Houston County April 8, 1903. It purported to convey for a consideration of \$30,000 eleven leagues situated in Cherokee and Anderson counties granted to Jose Pineda by the government of Mexico; four leagues situated in Cherokee and Angelina counties granted to Jesus de la Garza by the government of Mexico, "and all other tracts or parcels of land in the aforesaid State that the said I. T. Bean may have control of as the sole heir of Peter E. Bean, deceased." An objection to this deed on account of the failure to show a power of



attorney from Isaac T. Bean to William Y. Lacy was overruled by the court upon the presumption of power. (2) The defendants offered in evidence a deed from David Snively to Jesse Duren, dated May 10, 1857, for one-third interest in a league of land granted to Peter Ellis Bean by the government of Mexico, situated on the north side of the Neches River and Serito Creek. It was objected to and ruled out by the court because it did not convey the land in controversy, which the evidence showed lay on the south of the Neches River in Houston County, and it also appeared from the evidence that there was a P. E. Bean league on the north side of the river in Cherokee County. (3) A deed from Jesse and B. F. Duren to J. C. Kennedy dated January 31, 1859, conveying the land in controversy. (4) A deed from the executors of Kennedy to Frances D. Rice, dated December 4, 1868. (5) Frances D. Rice and husband to W. L. Cox, dated September 17, 1872. (6) W. L. Cox and wife to U. L. Wilson, dated November 22, 1875. (7) U. L. Wilson and wife to J. L. Sullivan, dated May 6, 1880. (8) J. L. Sullivan to Miss E. A. Sullivan, dated November 12, 1888. (9) Ella S. Perkins to John Carlisle, dated February 20, 1901. It was shown that Miss Ella A. Sullivan became Ella S. Perkins by marriage and a feme sole by the death of her husband. Duren took possession of the land in controversy by virtue of the deed from Snively to him and made improvements thereon, but abandoned possession before the bar of limitation was complete. Alex Woodward was the owner of and resided on a tract of land on an adjoining league known as the Williams survey. His inclosure extended over to the Bean league and the land in controversy and included therein from ten to fifteen acres, which he held for more than ten years from the year 1881. He took possession of the land on the Bean league without authority of the owner, but W. L. Sullivan, the owner at the time, having found him in possession, gave him permission to use the land upon his acknowledgment of tenancy and an agreement to prevent the timber from being wasted. Afterwards when Ella S. Perkins became the owner of the land the same agreement was made with B. F. Duren as her agent. The testimony adduced was sufficient to establish title by limitation of ten years.

A motion for a new trial was made on the ground of newly discovered evidence affecting the issue of limitation. But as we are of the opinion that an outstanding title was shown in David Snively it will not be necessary to pass upon the grounds of the motion.

The outstanding title in David Snively depends upon the presumption of a power of attorney from Isaac T. Bean to William Y. Lacy to execute the deed to Snively. As already stated the deed was dated April 3, 1856, and was recorded in Cherokee County, April 8, 1856. As was shown, Snively conveyed a part of the land to Jesse Duren and the latter took possession of the land in controversy as the land conveyed to him by Snively and it afterwards passed by regular chain of title to the defendant Carlisle. The plaintiffs put in evidence a certified copy from



the records of Cherokee County of a power of attorney from Isaac T. Bean to William Y. Lacy dated — day of June, 1853, which showed that the instrument was acknowledged January 19, 1854, and was recorded in the record of deeds in Cherokee County on April 7, 1856, book L, page 232. The deed from Isaac T. Bean by William Y. Lacy as attorney in fact to David Snively was recorded in book L, on pages 233 and 234 of said records. This is claimed to be conclusive evidence that Lacy acted under this power of attorney. The power conferred by this instrument was "to ask, demand, receive, sue and receipt for all moneys, goods, chattels, lands, tenements, and hereditaments which may be due and owing to said Isaac T. Bean as the sole heir of Peter E. Bean, deceased, and the said Lacy is further authorized to exercise his discretion in the settlement of any disputes, controversies or suits that are now or may hereafter arise, concerning of or in relation to the above property by compromise or otherwise as may seem just and right to him." There is no construction by which this instrument can be held to confer the power to sell land. But still a power may be presumed. The quantity of land conveyed amounted to many leagues and the consideration therefor was very large. Isaac T. Bean lived until July 5, 1899, when he died in Bell County not a great distance from the land in controversy. He never claimed it or paid taxes thereon after the conveyance to Snively. He had been solicited a number of times to give authority to bring suit for the land and had declined to do so, offering, however, to sell by quitclaim whatever interest he had. He and William Y. Lacy were brothers-in-law and they and David Snively were intimate with each other. Lacy was generally recognized as the agent of Bean in his land transactions. Power in Lacy to execute the conveyance to Snively being presumed, an outstanding title would be shown which would prevent the plaintiffs from recovering the land independently of the question of limitation, and the motion for a new trial on the ground of newly discovered evidence being addressed to that alone, becomes immaterial. The judgment of the court below will be affirmed.

*Affirmed.*



EUGENIA WELBORNE v. GULF, COLORADO & SANTA FE  
RAILWAY COMPANY.

Decided April 8, 1904.

**1.—Railroads—Obstructing Crossing—Negligence—Question for Jury.**

Evidence considered and held to raise the issues of negligence on the part of defendant's employes in stopping its engine upon a crossing and allowing it to remain there an unnecessary length of time and of contributory negligence on the part of plaintiff in going upon the crossing under the circumstances, both of which issues should have been submitted to the jury.

**2.—Same—Proximate Cause.**

The negligent act of defendant in stopping its engine on a crossing and allowing it to remain there an unnecessary length of time held to be the proximate cause of the injury in the case of one whose horse took fright at the noise made by the engine, a usual and necessary incident to its operation, where the evidence reasonably showed that the horse would not have been frightened at the noise if the engine had been stopped at a proper distance from the crossing.

Appeal from the District Court of Burleson. Tried below before Hon. Ed. R. Sinks.

*John W. Parker* and *W. C. Halbert*, for appellant.

*J. W. Terry* and *A. H. Culwell*, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—This is a suit by appellant against the appellee to recover damages for injuries to her person alleged to have been caused by the negligence of appellee's employes. The petition alleges that appellant was injured by being thrown from her buggy, the horse which she was driving having been frightened and caused to run away by an engine which the employes of appellee had negligently stopped upon the crossing of a public street in the town of Somerville along which plaintiff was driving, and negligently permitting to remain upon said crossing for an unreasonable length of time. The evidence adduced by plaintiff was in substance as follows:

The railroad of appellee runs through the town of Somerville from north to south. Plaintiff at the time she was injured lived on the west side of the railroad in said town, but took her meals at a boarding house on the east of the railroad. There were only two streets in the town which crossed the railroad. One of these crossings was just south of the depot and the other a block further south. The street which crossed at the depot was the principal street of the town and the crossing at that place was generally used by the citizens, most of whom lived on the east of the railroad, while the business portion of the town was on the west side. On the evening of August 15, 1901, between 6 and 7 o'clock, while plaintiff was at supper at her boarding house a freight train on appellee's road came in from the south and stopped on the crossing near the depot. After plaintiff had finished her supper, which was fifteen or twenty minutes after the train came in, she and a friend



the records of Cherokee County of a power of attorney from Isaac T. Bean to William Y. Lacy dated — day of June, 1853, which showed that the instrument was acknowledged January 19, 1854, and was recorded in the record of deeds in Cherokee County on April 7, 1856, book L, page 232. The deed from Isaac T. Bean by William Y. Lacy as attorney in fact to David Snively was recorded in book L, on pages 233 and 234 of said records. This is claimed to be conclusive evidence that Lacy acted under this power of attorney. The power conferred by this instrument was "to ask, demand, receive, sue and receipt for all moneys, goods, chattels, lands, tenements, and hereditaments which may be due and owing to said Isaac T. Bean as the sole heir of Peter E. Bean, deceased, and the said Lacy is further authorized to exercise his discretion in the settlement of any disputes, controversies or suits that are now or may hereafter arise, concerning of or in relation to the above property by compromise or otherwise as may seem just and right to him." There is no construction by which this instrument can be held to confer the power to sell land. But still a power may be presumed. The quantity of land conveyed amounted to many leagues and the consideration therefor was very large. Isaac T. Bean lived until July 5, 1899, when he died in Bell County not a great distance from the land in controversy. He never claimed it or paid taxes thereon after the conveyance to Snively. He had been solicited a number of times to give authority to bring suit for the land and had declined to do so, offering, however, to sell by quitclaim whatever interest he had. He and William Y. Lacy were brothers-in-law and they and David Snively were intimate with each other. Lacy was generally recognized as the agent of Bean in his land transactions. Power in Lacy to execute the conveyance to Snively being presumed, an outstanding title would be shown which would prevent the plaintiffs from recovering the land independently of the question of limitation, and the motion for a new trial on the ground of newly discovered evidence being addressed to that alone, becomes immaterial. The judgment of the court below will be affirmed.

*Affirmed.*



EUGENIA WELBORNE v. GULF, COLORADO & SANTA FE  
RAILWAY COMPANY.

Decided April 8, 1904.

**1.—Railroads—Obstructing Crossing—Negligence—Question for Jury.**

Evidence considered and held to raise the issues of negligence on the part of defendant's employes in stopping its engine upon a crossing and allowing it to remain there an unnecessary length of time and of contributory negligence on the part of plaintiff in going upon the crossing under the circumstances, both of which issues should have been submitted to the jury.

**2.—Same—Proximate Cause.**

The negligent act of defendant in stopping its engine on a crossing and allowing it to remain there an unnecessary length of time held to be the proximate cause of the injury in the case of one whose horse took fright at the noise made by the engine, a usual and necessary incident to its operation, where the evidence reasonably showed that the horse would not have been frightened at the noise if the engine had been stopped at a proper distance from the crossing.

Appeal from the District Court of Burleson. Tried below before Hon. Ed. R. Sinks.

*John W. Parker* and *W. C. Halbert*, for appellant.

*J. W. Terry* and *A. H. Culwell*, for appellee.

**PLEASANTS, ASSOCIATE JUSTICE.**—This is a suit by appellant against the appellee to recover damages for injuries to her person alleged to have been caused by the negligence of appellee's employes. The petition alleges that appellant was injured by being thrown from her buggy, the horse which she was driving having been frightened and caused to run away by an engine which the employes of appellee had negligently stopped upon the crossing of a public street in the town of Somerville along which plaintiff was driving, and negligently permitting to remain upon said crossing for an unreasonable length of time. The evidence adduced by plaintiff was in substance as follows:

The railroad of appellee runs through the town of Somerville from north to south. Plaintiff at the time she was injured lived on the west side of the railroad in said town, but took her meals at a boarding house on the east of the railroad. There were only two streets in the town which crossed the railroad. One of these crossings was just south of the depot and the other a block further south. The street which crossed at the depot was the principal street of the town and the crossing at that place was generally used by the citizens, most of whom lived on the east of the railroad, while the business portion of the town was on the west side. On the evening of August 15, 1901, between 6 and 7 o'clock, while plaintiff was at supper at her boarding house a freight train on appellee's road came in from the south and stopped on the crossing near the depot. After plaintiff had finished her supper, which was fifteen or twenty minutes after the train came in, she and a friend



got into her buggy to drive to her home. The circumstances under which the accident occurred are thus detailed by plaintiff: "We got in the buggy, and at that time we had the horse's head turned as we had driven up to the house. We turned and looked at the lower crossing and that was also blocked; the train was long enough to extend from where the engine stood back beyond the other crossing, and the train had not been parted at that crossing. Then we drove up to the crossing at the depot. When we saw the lower crossing was also blocked, we were just the width of the street from the crossing at the depot. As we drove up to the crossing at the depot I looked on the engines and saw nobody on them. I looked right straight at the engines, and we reached the conclusion that as there was no one on them that they were stopped right there and were going to be still, and we would go on. We drove then up on in front of the engines, and as we got up on top of the tracks I saw that I would have to turn right back by the engines to get to a bridge just over the crossing, and I saw my horse looked like he was a little excited, and I stopped him plumb still, right in front of the engine on top of the tracks. I stopped him perfectly still. Then when I went to proceed I had to pull him back by the engines, and I pulled him back by the engines, and at that time I heard some fuss with the air pumps, and then the horse shied. I had had the horse under perfect control when I stopped him just before this. It was when the fuss started on the engine that he did the shying, and as he shied off from the engine the hind wheel of my buggy struck the railing on the bridge, and then he started to run. The horse had manifested some uneasiness just as I got where I had to turn round the engines, but I stopped him and had him under perfect control, and could have still controlled him if it had not been for the fuss on the engine that scared him. It was then that I lost control. There was a space of fifteen or twenty feet in front of the cow-catcher in which I could drive. The good part of the crossing was taken up by the front part of the engine, as I have stated, but I could use the other part of the crossing, and my buggy went over the crossing all right, but I had to pull my horse back in order to reach the bridge that was over the ditch right opposite the crossing, as the engine had too much of the crossing taken up for me to go straight across to the bridge. That was the reason I pulled my horse back towards the engines; there was no other way for me to have driven him. After I got my horse up on the track, I did not have room to turn around and go back the way I had come, but after I got there I had to go on. I had not observed any noise until I reined my horse back by the engine. I was keeping a lookout and was right at the engines, and I think I would have heard any noise on the engine if it had been going on when I went up on the track. Everything seemed to be still and no one on the engines. I think the noise started just as I went to rein the horse back by the engine, after I had stopped him. I did not know that noise was likely to be made, as there was no one on the engine. The engineer and



fireman were eating supper at the Harvey House. When the horse ran I was thrown out about fifty feet from the crossing as the horse turned. I sustained a hip injury by the fall that I have not gotten over. From the time the train was stopped until I undertook to drive across, about fifteen or twenty minutes had elapsed."

Plaintiff was an experienced driver and had been using the horse she was driving at the time of the accident for five years as her buggy horse. She testified that the horse was easy to control and that she had theretofore been always able to control him. He was about twelve years old and perfectly accustomed to engines and cars and had never previously taken fright at a train, although she had driven him just as close to cars and engines on former occasions. It was shown that this horse had run away on two previous occasions, once in 1894 and again about three years before the time of the accident in question, but it was also shown that on both these occasions when he started to run no one had hold of the lines or any control of any kind over him. Several witnesses testified that he was a safe and gentle horse, but that he would not stand without being tied or held, and whenever he found he was loose he would run. The evidence is conflicting upon the issue of whether the engine was stopped on the crossing as claimed by plaintiff. The evidence shows that the noise made by the engine was very slight, and was the usual and customary noise made by the air pump which supplied the air for the brakes. This air pump was worked automatically by steam from the engine and the occasional noise made by it was necessarily incident to the proper operation of the train. Upon this evidence the trial court instructed the jury to find a verdict for the defendant, and upon the return of such verdict judgment was rendered in accordance therewith.

We think the evidence clearly raises the issue of negligence on the part of appellee's employes in stopping the engine upon the crossing and allowing it to remain there an unnecessary and unreasonable length of time, and it can not be said as a matter of law that plaintiff was guilty of contributory negligence in going upon the crossing under the circumstances stated in her testimony. Both of these issues were questions for the jury and should have been submitted to them under proper instructions. *Missouri K. & T. Ry. Co. v. Jones*, 13 Texas Civ. App., 378; *Sherman S. & S. Ry. Co. v. Bridges*, 16 Texas Civ. App., 64; *Galveston H. & S. A. Ry. Co. v. Simon*, 54 S. W. Rep., 309.

From the foregoing conclusions of law it follows that the trial court erred in instructing the jury to return a verdict for the defendant unless, as contended by appellee, the undisputed evidence shows that the alleged negligence of its employes in stopping the engine upon the crossing was not the proximate cause of plaintiff's injury.

It is earnestly insisted that the statement of plaintiff that her horse did not take fright at the engine but at the noise made by the engine eliminated the question of negligence arising from the position of the



engine on the crossing, and since the undisputed evidence shows that the noise which frightened the horse was but a usual and necessary incident to the operation of the engine, the evidence fails to show that plaintiff's injuries were proximately caused by any negligence on the part of appellee's employes. This contention can only be sustained upon the theory that the noise made by the engine would have frightened plaintiff's horse and caused her injury if the engine had not been upon the crossing, but had stopped and remained a proper distance from it, and this theory finds no support in the evidence. On the contrary, the reasonable conclusion to be drawn from the evidence is that the proximity of the engine to the horse when it made the noise was the cause of his fright, and that if the same noise had been made by the engine at a proper distance from the crossing the horse would have paid no attention to it. The evidence shows that this horse had been often driven about trains and near engines and had never before shown any fear of them. The fair inference from the evidence is that the horse must often before have heard the noise which frightened him on this occasion, and the reason that it had never frightened him before was that it had never been made by an engine so close to him. We do not understand from the evidence that the noise caused the horse to run. It made him shy away from the engine and caused the buggy to strike against a railing near the crossing and the noise of this collision caused him to run, and it is not improbable that had there been more room on the crossing the plaintiff could have controlled him after he had shied from the noise of the engine and the runaway would not have occurred. But be this as it may, we think the jury might have found from the evidence that the presence of the engine upon the crossing was the proximate cause of plaintiff's injury, and the issues of negligence on the part of appellee's employes and of contributory negligence on the part of plaintiff should under the evidence adduced by plaintiff have been submitted to the jury. The judgment of the court below is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

ON MOTION FOR REHEARING AND TO CERTIFY TO THE SUPREME COURT.

PLEASANTS, ASSOCIATE JUSTICE.—Counsel for appellee urge in a motion for rehearing filed herein that this court erred in holding that the evidence in the case was sufficient to raise the issue of negligence on the part of appellee which proximately caused the injuries complained of by appellant, and by separate motion requested us to certify the question to the Supreme Court for decision.

The motion for rehearing reiterates the contention made in appellee's brief that as the undisputed evidence shows that plaintiff's horse took fright at the noise made by the engine and not at the engine, it follows that the stopping of the engine upon the crossing, if negligence, was not the proximate cause of appellant's injuries.



Our high respect for the learning and ability of counsel who present this argument induces us to add the following to what was said in the main opinion. In determining the question presented, the usual and necessary noise made by a locomotive engine must be considered as much a part of the engine as the smoke or steam which it emits or any of its physical parts. It was not negligence on the part of appellee's employes to allow the engine to make the noise which frightened appellant's horse, because such noise was usual and necessary in the proper operation of the train, and yet they might be negligent in stopping an engine with such accompanying noise upon a railway crossing and thereby frightening the team of a person using the crossing although such team was frightened by the noise made by the engine and not by the appearance of the engine. Let us suppose that appellant's horse had been frightened at the smoke or the steam which must necessarily be emitted by an engine when ready for operation. In such case it certainly could not be contended that the fright of the horse was not caused by the engine, and we can see no possible distinction between the case stated and the case made by this record. The vice in appellee's argument consists in the attempt to divorce the noise incident to the operation of the engine from the engine itself, when under the circumstances shown by the evidence they are inseparable.

We have no doubt as to the soundness of our conclusions upon this issue and must therefore decline to certify the question to the Supreme Court. It would, in view of the earnestness with which counsel urge their motions, gratify this court to have the Supreme Court pass upon the question, but in the absence of any doubt in our minds we are not authorized under the statute to certify the question to that court for decision.

The motions for rehearing and to certify are both overruled.

*Overruled.*



## JOHANNA BETZER ET AL. V. E. W. GOFF.

Decided April 8, 1904.

**1.—Power of Attorney—Specific Performance—Stale Demand.**

Suit by an attorney for recovery of a half interest in a tract of land as attorney fees, according to agreement in a power of attorney given, is not an action for specific performance of a contract to convey land, but one for the recovery of land, and the doctrine of stale demand can not be invoked as a defense, because the suit was not instituted within ten years from date of giving such power of attorney.

**2.—Same—Title to Land—Tax Deed—Quitclaim Deed.**

A power of attorney conveying to attorneys one-half of all the lands of the donor, the title to which was recovered by them, held to include land held by parties claiming adversely under a tax deed, a quitclaim deed to which the attorneys secured by compromise.

Error from the District Court of Jefferson. Tried below before Hon. A. T. Watts.

*Geo. W. Glasscock and J. D. Martin*, for plaintiffs in error.

*N. A. Rector*, for defendant in error.

PLEASANTS, ASSOCIATE JUSTICE.—Defendant in error brought this suit against the plaintiffs in error to recover the title and possession of an undivided one-half of a tract of 213 acres of land in Jefferson County, and for partition of said land. The original petition which was filed May 21, 1901, was in the usual form of an action of trespass to try title and for partition. The amended petition upon which the case was tried was filed May 4, 1903, and in addition to the ordinary allegations in an action of trespass to try title, sets out the chain of title under which the land was claimed.

The answer of defendant contained a general demurrer, a special demurrer on the ground that plaintiff's cause of action was a stale demand, a plea of not guilty, and a special plea of laches and stale demand.

The trial in the court below without a jury resulted in a judgment for plaintiff in accordance with the prayer of the petition. The findings of fact by the trial court are not assailed by plaintiffs in error, and are as follows:

"First. On the 2d day of May, 1892, Caroline Rochow, then a widow, owned the 213 acres of land described in plaintiff's petition, having inherited the same from her then deceased husband, August Reuss.

"Second. On the 2d day of May, 1892, the said Caroline Rochow, joined by Aug. Bischoff and his wife Alma Bischoff, executed and delivered to James B. Goff and Edward W. Goff a power of attorney among other things reciting: 'Whereas James B. Goff and Edward W. Goff of Austin, Texas, have rendered valuable services in investigating our title to certain lands in the State of Texas; now therefore, in consideration thereof, the undersigned hereby appoint said James B. Goff and Edward W. Goff and each of them, and the survivor of them, our attorneys in



fact, jointly or severally for us and in our name to discover, sue for and reduce to possession by suit, compromise or otherwise, all lands, moneys and other property lying in said State of Texas to which we may be entitled as heirs of August Reuss, deceased, or which were granted or conveyed to said Reuss or his heirs, to compromise such suits, and our claims to said lands, etc., and sell the same on such terms as may be deemed best for our interest, etc. And in consideration of their services performed and to be performed, and their outlay for expenses incurred and to be incurred, we hereby convey to said James B. Goff and Edward Goff one undivided one-half of all of such lands, etc.'

"Aug. Bischoff and Alma Bischoff had no interest in the land at the time the power of attorney was executed, but Aug. Bischoff was then and continued to be the agent of Caroline Rochow until the 27th day of December, 1894, at which time Mrs. Caroline Rochow departed this life.

"Third. On August 8, 1892, Aug. Bischoff acting for Caroline Rochow wrote to James B. Goff & Son as follows: 'Your favor of the 5th inst. to hand and contents noted. In reply to same wish to say that we tried to pay the tax in Nueces County, but they would not accept it; therefore it is not sold. The land in Jefferson County, we paid taxes for some years and then neglected it, so I think there will be a little trouble, as it might have been sold for taxes; but see what you can do and sell it to the best advantage.'

"On August 9, 1892, James B. Goff & Son duly mailed to Aug. Bischoff a reply in which among other things it was stated: 'Yours 8th received. We wish to state that it is impossible to place the 160 acres in Nueces and the 213 acres in Jefferson County (patents to which you sent us) on the market in their present condition, but we will attend to them as well as the other surveys we find and act under the contract which has been executed to us. We state this plainly because we want no misunderstanding on the part of Mrs. Rochow or any of the Reuss heirs when it comes to paying our fee of our half,' etc.

"This letter also conveyed the information that both the 160-acre tract in Nueces and the 213 acres in Jefferson County had been sold for taxes and that the purchasers were claiming under their tax deeds.

"Aug. Bischoff testified that he did not remember receiving this letter, while Edward W. Goff testified that the letter was duly mailed, and had not been returned to James B. Goff & Sons.

"Fourth. Prior to Mrs. Caroline Rochow's death, James Goff and Edward W. Goff had compromised with the parties claiming the lands in Nueces and Jefferson counties under tax deeds and had quitclaim deed therefor from them.

"Fifth. Caroline Rochow died the 27th day of December, 1894, and the defendants now own all of her interest in the land in controversy as set forth and stated in plaintiff's amended petition.

"Sixth. That Caroline Rochow was the widow of A. Reuss, to whom



the land in the suit was patented, and she inherited all the property of A. Reuss solely as her own and his only heir.

"Seventh. At the date of the execution of the power of attorney, to wit, May 2, 1892, the patent to the 213 acres of land in controversy was in possession of Mrs. Caroline Rochow.

"Eighth. After the execution of the power of attorney to Goff, Aug. Bischoff sent the patent to Messrs. Goff with request to sell the land, nor did he know at the time that the land was claimed under a tax title.

"Ninth. In April, 1895, administration of the estate of Mrs. Caroline Rochow was begun in De Witt County, and was kept open until July, 1900, when it was closed.

"Tenth. James B. Goff died before the institution of this suit and Edward W. Goff now owns all the interest of said James B. Goff in said land.

"Eleventh. The Goffs, acting under said power of attorney, sold the Nueces County land in 1895, and after some objection the defendants recognized this sale and accepted one-half of the purchase money, the Goffs retaining the other half.

"Twelfth. Plaintiff's original petition, which was a simple suit of trespass to try title, was filed herein May 21, 1901.

"Thirteenth. There has been no actual occupancy or possession of the land in controversy.

"Fourteenth. Caroline Rochow held the patents to the Nueces and Jefferson County lands at the time this power of attorney was executed, and said patents were sent to the Goffs about August 8, 1892."

Plaintiffs in error contend under their first, second and third assignments of error, that the cause of action set up in the amended petition being one for the specific performance of a contract to convey land and said amendment not having been filed within ten years after the date of the contract, plaintiff's suit was a stale demand and was barred by the ten years statute of limitation. This contention is without merit. Plaintiff's suit was for the recovery of land and the amendment in no way changed the character of the suit, but simply set out the chain of title under which plaintiff claimed. It matters not whether this title be legal or equitable, if it be a title as distinguished from a mere equitable right to acquire title the doctrine of stale demand can not be invoked as a defense to the suit. *Secrest v. Jones*, 21 Texas, 121; *Martin v. Parker*, 26 Texas, 253; *Trinity Lumber Co. v. Pinckard*, 4 Texas Civ. App., 681; *Stafford v. Stafford*, 96 Texas, 106, 70 S. W. Rep., 75.

If the suit could be regarded as one for the specific performance of a contract for the conveyance of land the evidence fails to show that the cause of action was barred, since it did not accrue until the Goffs had procured a right in the land by a performance of the services undertaken by them under the power of attorney, and the evidence does not show the date of such performance.

The fourth assignment of error assails the judgment on the ground that the land in controversy was not embraced in the power of attorney



under which plaintiff claims. The power of attorney conveyed to the Goffs one-half of all the lands of the donor, the title to which was recovered by them, and the trial court found that the land in controversy was held adversely to Mrs. Rochow by parties claiming under a tax deed, and that the Goffs acting under said power of attorney compromised with the adverse claimants and procured a quitclaim deed from them for said land. While there is no affirmative finding of that fact it is manifest that the title thus secured by the attorneys was for the benefit of their donor; there is no intimation that they ever asserted any claim under said title adverse to Mrs. Rochow or the plaintiffs in error, and the petition in this suit recognizes the title of plaintiffs in error to the one-half of the land not claimed by plaintiff under the power of attorney.

Under these facts we think the plaintiff showed title to the one-half interest in the land sued for, and the judgment of the trial court is affirmed.

*Affirmed.*



## L. H. BAILEY V. BEN W. FLY.

Decided April 9, 1904.

**1.—Contested Election—Pleading—Amendment.**

In an election contest the rules governing the amendment of pleadings in civil cases apply. Following ruling of Supreme Court on certified question in this case, as reported in 97 Texas, 425.

**2.—Same—Inability to Pay Costs—Affidavit.**

An action to contest an election may be maintained upon an affidavit of inability to pay costs. Following ruling in 97 Texas, 425.

**3.—Same—Ordering New Election.**

Under the statute the court trying a contested election case may order a new election only where the result of the contest as shown by the vote is a tie, and if there be a majority, however scant, the court has no discretion to make such order.

**4.—Same—Influencing Votes—Threats of Eviction by Landlord.**

Threats of a landlord to evict his tenants unless they voted for the candidate he favored do not warrant throwing out the box at that polling place where it is not shown that such threats were addressed to the tenants, nor how they voted, nor that the candidate was privy to such conduct. Evidence held to show that a tenant was not so intimidated or influenced in casting his vote by such threats of eviction as to render the vote illegal.

**5.—Same—Evidence—Post-Election Declarations—Impeaching Witness.**

While declarations by a voter as to his place of residence, made after the election, are not admissible as original evidence, they may be admissible for purposes of impeachment where the voter had testified, as a witness in the case, that he had claimed the county of the election as his home for six months prior to the election.

**6.—Same—Illegal Voter—Identity.**

Where no identity of person was shown proof that the vote of Jesus Nieto was illegal did not warrant the exclusion of the vote of Terus Nieto.

**7.—Same—Ballot—Erasing Name.**

A ballot should not be counted upon which the names of two candidates are printed and neither of the names is erased, although a pencil mark is drawn under one of the names, but not touching it. Rev. Stats., art. 1741.

**8.—Conclusions of Law and Fact—Refusal to File.**

A refusal of the trial court to file conclusions of law and fact is not reversible error where request therefor was not made until the last day of the term, and the court certifies that there was not time to prepare them.

**9.—Evidence—Baptismal Records—Hearsay.**

Where the keeper of a baptismal record, since deceased, had made an entry on the record of the date of the party's birth as well as of his baptism, the date of birth could not be proven by the record since it was a fact not appearing to have been within the knowledge of such keeper, and hence hearsay.

ON REHEARING.

**10.—Same—Bribery and Intimidation.**

In the absence of a showing of connivance or procurement on the part of a candidate for office, the box at a voting precinct will not be entirely thrown out upon an allegation that a partisan of such candidate influenced a portion of the voters at that point, by bribery or intimidation, where the proof fails to identify a single voter who was influenced or to establish that any were so influenced.

**11.—Same—Throwing Out Box.**

The rule requiring the elimination of an entire box where practices are resorted to which necessarily or probably influence a large number of voters, and which by reason of its nature and effect is rendered impossible of definite ascertainment, held not applicable to this case.

Appeal from the District Court of Victoria. Tried below before Hon. Jas. C. Wilson.



*Samuel B. Dabney*, for appellant.

*Proctors*, for appellee.

GILL, ASSOCIATE JUSTICE.—This is a contest for the office of county judge of Victoria County and was brought by the appellant, Bailey, under the statute. The court found for the appellee, Fly, upon a majority of one vote, and Bailey has appealed. Appellee moved to strike out the statement of facts and the motions were taken with the case. They have been considered and are overruled.

The action was instituted December 2, 1902. On December 12th, the last day for answer allowed under the statute, Fly answered. On the same day Bailey filed his exceptions that the answer was a sham, as it named no illegal vote or miscounts. For lack of time these exceptions were not passed on at that term and a continuance was had. On December 12th there was a motion to require appellant to file a cost bond, and in response thereto Bailey ultimately filed an affidavit of inability to give security for costs.

Fly filed several amendments but the trial was had upon the amendment filed April 30, 1903. To all the amendments Bailey urged exceptions on the ground that in this character of contest amendments are not allowable except in the elaboration of allegations contained in the first answer and seasonably filed, and that the amendment upon which the cause was tried was violative of the rule as thus stated, was not seasonably filed, and that he was unprepared upon the new issues thus made and a continuance would be destructive of his rights.

The exceptions were overruled and the cause was tried in March, 1903, resulting as stated.

The appellee made the point that an action such as this can not be maintained upon an affidavit of inability to secure the costs.

The appellant presented the question of the right to amend. Both these questions were certified by us to the Supreme Court, and the answers sustained the appellant's contention as to security for costs and the appellee's contention on the question of amendment. On the latter point it was ruled that the right to amend existed in this cause as in civil cases, and relegated to this court the question as to whether the right had been abused to the detriment of appellant.

In the court below the appellant in opposing the amendment upon which the cause was tried contended that he was not ready upon the new issues thus made, but the trial disclosed no lack of readiness, nor did the motion for new trial disclose the existence of additional evidence which would have affected the result. Indeed no effort during the trial or on motion for new trial was made to show injury in this respect. For these reasons we are of opinion the assignments assailing the action of the court in allowing the amendments should be overruled.

The count of the returns by the commissioners court gave Fly 949 votes, Bailey 946 votes, and Thurmond, the third candidate for the



office, 473 votes. On the trial the evidence was heard and the ballots recounted. After certain deductions from and additions to the vote of each party the court found as a fact that Fly had received 939 legal votes and Bailey 938. We do not deem it necessary to set out the voluminous facts upon which the court reached this conclusion. We deem it sufficient to set out the state of the record as to each voter the legality of whose vote is the subject of an assignment of error.

When the trial court announced his conclusion disclosing a majority of one for the appellee, the appellant moved the court to order a new election on the ground that it was impossible to determine from the evidence which of the parties was entitled to the office. The court overruled the motion and his action is assigned as error.

The statute requires the court to order a new election only in case the result of the contest is a tie. The facts in such a contest are to be ascertained as in any other case, and it is the duty of the court as a trier of fact to pass on the credibility of the witnesses and the sufficiency of the evidence and announce the fact result. Unless that result is a tie the judgment must inevitably award the office to the one found to have received a majority of the legal votes cast, however scant that majority may be. After the facts are thus found the court has no discretion as to the nature of his judgment.

Appellant insists that the Guadalupe box should have been thrown out on account of alleged intimidations practiced by one Traylor in asserting, in substance, that he asked only occasional favors of his tenants, and they must vote as he chose or move. These threats, if indeed they were taken as serious, were not shown to have been addressed to his tenants, and it is not shown how his tenants voted. While he worked at the polls as a partisan of Fly, the latter is not shown to have been privy to his conduct. We do not think the voters at that box should be disfranchised on such a slight showing. If a particular voter is shown to have been affected the rule would be different as to him, but of this we shall see further.

The same is true of the allegations of bribery. The result of elections ought not to be disturbed on such vague and intangible grounds.

By the twentieth assignment appellant complains that the trial court erred in refusing to find that the voter John Coleman, of the Guadalupe box, had been intimidated by a threat of eviction from Traylor and thereby induced to vote for Fly. This voter testified that he intended to vote for Bailey, but that wishing to please Traylor, who was his friend, he voted for Fly. He was not a tenant of Traylor but of a relative of his. The voter testified that he was neither intimidated nor influenced by what Traylor said about eviction. His brother, Ben Coleman, was in the same position, openly voted for Bailey, and was not evicted. The assignment is overruled.

By the twenty-third assignment the action of the trial court is brought in question in respect to the admission of the testimony of Thomas Drodgy to the effect that the witness McCray had told him



subsequent to the election that he had not claimed Victoria County as his home until less than six months before the election. It seems to be well settled that such post-election declarations of the voter are not admissible as original evidence. *Davis v. State*, 75 Texas, 428. They were not, however, admitted as such. The voter testified in the case, and, while he claimed to have made Victoria County his home for more than six months preceding the election, his testimony tends to show that he was a transient, floating character making his home where he found work, and it was disclosed as a fact that within six months of the election he had spent thirty-six days in Matagorda County at work. The evidence complained of was admitted to impeach his testimony to the effect that he claimed Victoria as his home and intended to fix his citizenship there. Under the facts as stated by the voter his right to vote depended peculiarly on his purpose. We think as impeaching testimony the evidence of Drodgy was admissible. 1 Greenl. on Ev., sec. 462.

McCray voted for Bailey and his vote was excluded by the court. This is also assailed. We do not feel justified in disturbing the conclusion of the court upon this point. He saw the witness and heard him testify. In view of the facts disclosed by his testimony, which tended to support the judgment of the court upon the point, we can not say the court was wrong in refusing to credit his statement that he claimed and intended to make Victoria County his home in time to qualify him to vote at the election in question.

One Terus Mieto voted for Fly and the court refused to sustain the contention that his vote was illegal. Appellant complains of this on the ground that the undisputed evidence is to the effect that he was not a qualified voter. The evidence relied on refers to one Jesus Nieto, and the identity of the one with the other is nowhere shown.

Max Ramos, who voted for Bailey, was held not to have been qualified. Under the evidence we do not feel authorized to disturb this finding.

The legality of the vote cast by the negro Joe Brown for Fly depended on his age, and we think the evidence is ample to sustain the finding that he had attained his majority. Appellant concedes that the evidence on the point is conflicting.

The court did not err in refusing to file conclusions of fact and law, it appearing that the motion therefor was made on the last day of the term and the court certifying that there was not time to prepare them. If the appellant desired them he should have proffered the request sooner, as considerable time elapsed between the date of the judgment and the close of the term.

In view of appellant's contention that the judgment of the court is due to an erroneous calculation and is not sustained by his fact findings included therein, it is well perhaps to pass on such of the cross-assignments as are well taken.

The appellant assailed the vote of one Francisco Soto as illegal, he



having voted for Fly. The court excluded the vote on the ground that the voter was under 21 years of age. He was not called as a witness. His mother stated she thought he was 22 years old. The only evidence adduced by appellant to establish his minority was the deposition of Rev. Pitoye to the effect that he was the custodian of the baptismal records of his church. That the latter required such records to be kept, and that an entry in such records made by some of his predecessors in office showed that Francisco Soto had been baptized in March, 1884, the date of his birth being given as December 3, 1883. This evidence was admitted over the objection of appellee and the point is presented by cross-assignment.

It is doubtless true, upon a familiar principle, that the baptismal record would have been admissible to prove the fact and date of baptism and of any incidental issue which that fact might tend to establish, for that fact was within the peculiar knowledge of the person making the record; it was his duty to make it; and he is shown to be dead. But the date of birth was not within his knowledge and must have been acquired by hearsay. In *Town of Union v. Town of Plainfield*, 39 Conn., 564, it is held that an entry in a family Bible of the place of birth is not admissible on that issue. *Connecticut M. L. Ins. Co. v. Schwenk*, 94 U. S., 593, and *Metropolitan L. Ins. Co. v. Anderson*, 29 Atl. Rep., 606, sustain the conclusion that the evidence was inadmissible. The vote should have been counted for Fly.

We must also sustain appellee's eighth cross-assignment, which complains of the counting of a vote for Bailey upon which the name of both Bailey and Thurmond are printed and neither is erased. There is a pencil mark underneath the name of Thurmond, but the name is untouched and unmarked. The ballot does not disclose the intention of the voter. Article 1741 of the statute expressly forbids the counting of a ballot where the names of two candidates for the same office remain thereon. We are of opinion the record supports the conclusion of the trial court, and no reversible error being shown the judgment is affirmed.

*Affirmed.*

ON MOTION FOR REHEARING.

GILL, ASSOCIATE JUSTICE.—In passing on the contention of appellant that the Guadalupe and Pleasant Green boxes should be thrown out and not counted at all because of the misconduct of one Traylor, we stated in the main opinion that as Fly was not shown to have been privy to the practices complained of the contention could not be upheld. Counsel for appellant seems to have misapprehended our meaning. Of course we did not mean to be understood as holding that Fly would not be the loser to the extent of any votes shown to have been improperly influenced whether with or without his knowledge or consent. We meant no more than that in the absence of Fly's connivance or procurement the box would not be entirely thrown out merely on the showing



that Traylor had improperly influenced a portion of the voters at that point, or of efforts on his part in that direction not shown to have been effective.

We are still of opinion that if bribery or intimidation is relied on to defeat an election or to secure the elimination of a part of the vote the allegation must be proven as any other, that is to say, either by circumstances or direct proof. In this case, except as to John Coleman, whose vote is disposed of in the main opinion, the proof fails to identify a single voter who was influenced by the conduct complained of, or to establish that any were so influenced. Appellant confesses his inability to name or identify one. We know of no reason why the rule as to the quantum of proof should be more liberal in this character of case than another. In every litigation the plaintiff must make out his case.

We are aware of the rule requiring the elimination of an entire box where practices are resorted to which necessarily or probably influence a large number of voters, and where by reason of their nature the effect is rendered impossible of definite ascertainment. But this case does not present such a situation. The bribery complained of and sought to be established was brought to bear, if at all, upon individual voters. It is not shown that the efforts were in any instance effective, even if it be conceded that the efforts were shown to have been made.

As to the general threat of eviction against the tenants of Traylor's relatives, they could have been identified and their votes shown. This was not done.

We think we were justified in our conclusion that on the issue of threats and bribery we were not authorized to disturb the judgment.

The issue was made by plaintiff as one of the grounds of contest and was affected by the amendments complained of as having been erroneously allowed. On the question of the amendments we must adhere to our first conclusion. Whether the amendments were of such a nature as to operate to the injury of appellant was a question addressed first to the sound discretion of the trial court. The incidents of the trial seem to have justified his action. No absent proof was suggested, though the trial extended over several days. Every material issue was sharply contested and the facts developed. The new matters complained of as having operated as a surprise consisted of assaults on the legality of certain votes for Bailey.

The brief complains of the court's action as to but two of these, and as to them not upon the ground that contestant was not prepared upon the issues. We think it fairly appears the surprise complained of resulted in no injury to appellant. We deem it unnecessary to add anything further to what has been written. The motion is overruled.

*Overruled.*



## JOHN K. SCUDDER ET AL. V. JOHN W. COX ET AL.

Decided April 9, 1904.

**1.—Judgment in Suit by Publication—Attack Upon for Fraud.**

Where the judgment in a suit by publication recites that the defendant was duly and legally cited to appear, and that he appeared by his attorney under appointment of the court, fraud in its procurement does not render it void within itself, but merely affords ground to have it declared void by a proper proceeding seasonably instituted for that purpose.

**2.—Same—Purchaser Pendente Lite—Privity of Estate—Collateral Attack.**

Where the suit affects the title of land owned by the defendant, a purchaser from him takes the land subject to the contingencies of the suit; and, as a privy in estate, he is bound by the judgment, and can not collaterally attack it upon an allegation of fraud in its procurement.

**3.—Same—Collateral Attack.**

Where, in an action to try title to land, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid the effect of the judgment by alleging fraud in its procurement, this is a collateral and not a direct attack upon the judgment.

Appeal from the District Court of Lubbock. Tried below before Hon. J. M. Morgan.

*C. H. Earnest*, for appellants.

*W. B. Crockett*, for appellees.

SPEER, ASSOCIATE JUSTICE.—This was an action in the usual form of trespass to try title, instituted by appellants against a number of defendants, among whom was the appellee George W. Cox, the others having disclaimed at the trial. The appellee George W. Cox answered by general demurrer, general denial, not guilty, and specially that on the 26th day of February, 1889, one John M. Scudder filed a suit in Justice Court of Mitchell County, Texas, against one W. W. Smaill, in cause No. 1035 on the docket of said court, and made a false and fraudulent affidavit, for the purpose of procuring a citation by publication, that said Smaill was a nonresident of the State of Texas. It is alleged that said Scudder knew said Smaill intimately, and evidently knew the place of his residence at the time of making said affidavit, which was alleged to have been in Denton County, Texas. The answer alleged that said affidavit was made for the purpose of procuring a fraudulent judgment against said Smaill, without the knowledge or notice of said Smaill, with the purpose in view of getting the title to the section of land in controversy in this suit. That said Smaill never had any notice of the pendency of said suit, and that he never authorized anyone to appear and answer for him. The appellee further specially pleaded that he and his vendors paid a valuable consideration for said land, and that they are innocent purchasers without notice. There were other special answers which are not necessary to be noticed.

Upon the trial the jury returned a verdict for appellee upon a charge from the court to the effect that if they found from the evidence that



at the time of the institution of the suit above referred to, and the procurement of the writ of attachment which was levied upon the land in controversy, the defendant in said suit was a citizen of the State of Texas, and John M. Scudder knew of such residence, and said affidavit was false and fraudulently made, then in that event to find for the defendant. Dr. W. W. Smaill is the common source of title. Appellants claim through an attachment lien by virtue of an attachment, dated March 6, 1889, and levied upon the land in controversy as the property of said Smaill on the 11th day of said month, issued in cause No. 1035 already referred to. The appellee claims title through a deed of conveyance executed by said Smaill June 29, 1889.

All of the assignments of error, in one form or another, challenge the appellee's right to attack the judgment of the Justice Court of Mitchell County for fraud, and in our opinion they must be sustained. A copy of the judgment in the justice court case, which is incorporated in the record, recites that the defendant had been duly and legally cited to appear, and also that he appeared by his attorney under appointment of the court. It is well settled that fraud of a party does not render the transaction absolutely void within itself, but simply affords ground to have it declared void by a proper proceeding seasonably instituted for this purpose. Judgments constitute no exception to this rule. *Murchison v. White*, 54 Texas, 85; *Maddox v. Summerlin*, 92 Texas, 485; *Irwin v. Bexar County*, 26 Texas Civ. App., 527, 63 S. W. Rep., 552; *Williams v. Haynes*, 77 Texas, 284.

It is asserted by appellee in this case, however, that he occupies the position of a stranger to the judgment against Smaill, and that he is therefore authorized to attack it collaterally. But we are clearly of opinion that he occupies the relation of privy to the defendant in said judgment, and that both are to be governed by precisely the same rules. A purchaser of lands from a defendant in a suit in which the lands have been attached takes them subject to all the contingencies of the suit, and is bound by the judgment therein. *Paxton v. Meyer*, 67 Texas, 96; *Tuttle v. Turner*, 28 Texas, 759; *Tilton v. Cofield*, 93 U. S., 163; *American Exchange Bank v. Andrews*, 59 Tenn. (12 Heisk.), 306. As a privy in estate such purchaser is bound by the judgment against his vendor, and can not collaterally attack it upon an allegation of fraud. *Hogg v. Link*, 90 Ind., 346; *Johns v. Pattee*, 55 Iowa, 665, 8 N. W. Rep., 653; *Black on Judg.*, par. 549.

That this is a collateral attack there can be no doubt. As said by Mr. Justice Denman in *Crawford v. McDonald*, 88 Texas, 630: "A direct attack on a judgment is an attempt to amend, correct, reform, vacate or enjoin the execution of same in a proceeding instituted for that purpose, such as a motion for a rehearing and appeal, some form of writ of error, a bill of review, an injunction to restrain its execution, etc. A collateral attack on a judgment is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on the judgment, defendant at-



tempts to deny the fact of indebtedness; or where, in a suit to try the title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effect, etc." When tested by these principles, there is no doubt that the attack of appellee falls within the latter class. The issue of fraud in procuring the judgment against Smaill constituted the only defense relied upon to sustain the judgment in appellee's favor, and this being a matter, as we hold, which he can not inquire into, and the evidence being undisputed that appellants are otherwise entitled to the land sued for, the judgment of the trial court should be reversed and judgment here rendered for appellants.

It is unimportant that the justice court judgment failed to foreclose the attachment lien. The proper course seems to have been pursued. The judgment recites the issuance and levy of the writ, and execution was subsequently issued on such judgment and the land sold. Sayles' Civ. Stats., art. 214.

*Reversed and rendered.*

Writ of error refused.



## WESTERN UNION TELEGRAPH COMPANY v. GEORGE K. JACKSON.

Decided April 9, 1904.

**Telegraph Company—Mental Suffering—Evidence.**

In an action against a telegraph company for mental suffering resulting from failure to promptly transmit and deliver a message informing plaintiff of the dangerous illness of his father, whereby he was deprived of the privilege of attending the funeral, it was error for the court to admit, over objection, the testimony of a witness to the effect that, before the message was sent, the father said, "It is hard to die without friends or relatives about you. I want you to send word to all the children if anything should happen to me, if I should get sick," since such evidence had no legitimate bearing upon the issue to be determined, and was calculated to unduly excite the sympathies of the jury.

Appeal from the District Court of Potter. Tried below before Hon. Ira Webster.

*Geo. H. Fearons and N. L. Lindsley, for appellant.*

*Wallace & Lumpkin, for appellee.*

SPEER, ASSOCIATE JUSTICE.—Appellee, George K. Jackson, who resides in Amarillo, Texas, sued appellant to recover damages for mental anguish occasioned him by its failure to properly transmit and deliver to him certain messages dated and received by it at Quincy, Ill., informing him of the dangerous illness and death of his father, by which negligent failure he was deprived of the privilege of attending the funeral. He had judgment for \$800.

Several assignments of error are presented, but we overrule them all save the first, which is: "The District Court erred in permitting, over the objection of the defendant, the following testimony of the witness Mrs. Mary Ahr: 'On Sunday, January 18th, I was with father, and a man in the next room to father's was said to be dying, who had no friends or relatives. Father said: "It is hard to die without friends or relatives about you. I want you to send word to all of the children if anything should happen to me, if I should get sick;"' the objection being that said testimony was immaterial and incompetent, and that any statements made by the father three days before his death is not res gestae, and that the same would be calculated to influence and prejudice the minds of the jury against the defendant." It is difficult to distinguish this case upon that question from that of *Western U. Tel. Co. v. Waller*, 96 Texas, 589, 74 S. W. Rep., 751. In that case, discussing testimony very similar to that offered and received in this, the Supreme Court, through Mr. Justice Williams, say: "We are of the opinion that the testimony was irrelevant and was calculated to excite unduly the sympathies of the jury and to cause them to lose sight of the true inquiry, which was the effect produced upon plaintiff himself by defendant's negligence. The direct and immediate tendency of the evidence was to show a state of mind of the mother, existing under



circumstances and with incidents strongly appealing to the feelings of those trying the case. The state of mind and those incidents were themselves not involved in the issue being tried." So in this case the reproduction before the jury of the statement of appellee's father made a few days before his death, was in its nature of such a character as to appeal strongly to the sympathies of those trying the case. It could have no legitimate bearing upon the real issue to be determined, to wit, the mental suffering of plaintiff which was to be anticipated by the parties to the contract in the event of a failure to faithfully execute it. See, also, *Fort Worth Iron Works v. Stokes*, 33 Texas Civ. App., —, 76 S. W. Rep. 231, and *Western U. Tel. Co. v. Stiles*, 89 Texas, 312.

For the error discussed, the judgment is reversed and the cause remanded for another trial.

*Reversed and remanded.*



## TARRANT COUNTY V. W. E. BUTLER ET AL.

Decided April 9, 1904.

**1.—Constitutional Law—Fees of County Clerk's Office Assigned to Counties.**

The Act of June 16, 1897, commonly known as the fee bill, in its provision that the fees of the office of county clerk in excess of certain stated amounts shall be paid over to the county treasurer, is not violative of section 48, article 3, of the Constitution declaring that the Legislature shall not have the right to levy taxes or impose burdens upon the people except for purposes therein specified relating to the State government, nor of section 51 of the same article providing that the Legislature shall have no power to make any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever.

**2.—Same—Conflicts by Implication Not Favored.**

If the statute, in fixing the compensation of county clerks at an amount of fees not exceeding a stated sum, can be said to place their compensation on a salary basis, contrary to the general scheme of the Constitution that their compensation shall be fixed by fees of office, still it is not in direct conflict with section 20, article 5, of the Constitution, providing that "the duties, perquisites and fees of office of the county clerk shall be prescribed by the Legislature;" and conflicts by mere implication with other provisions not relating to the subject are not to be entertained.

**3.—Same—Incidental Result Does Not Vitiare.**

That some of the populous counties will receive money through the excess of fees paid over to them under the statute is but an incidental and remote result of the law, which is designed to properly equalize the compensation of county clerks and to prevent some of them from receiving an unduly large compensation.

**4.—Same—Grant of Public Money to Municipal Corporation.**

The requirement that the excess of fees above a specified sum shall, in certain contingencies, be paid over to the county is not a grant of public money within the meaning of the constitutional provision inhibiting such a grant, for the Constitution can not be held to have had such a fund in view.

**5.—County Clerk—Settlement with Commissioners Court—Conclusiveness.**

The power given the commissioners court by Revised Statutes, article 1537, to "audit, adjust and settle all accounts and claims in favor of the county," is not to be construed as authorizing the county to receive a less sum than is actually due, and a recitation in an order of that court to the effect that a county clerk has fully paid to the county all sums he owed it for excess fees will not estop the county from recovering excess fees which the clerk, with the assent of the court, withheld under a claim he was not entitled in law to make.

**6.—Same—Duty of Clerk to Renew Indexes Worn Out—Expense Thereof.**

Since the statute makes it the duty of the county clerks to properly keep the records and indexes of his office and fixes his fees for transcribing, comparing and verifying record books of his office at so much per hundred words, payable out of the county treasury, it was improper for the commissioners court to allow the clerk, in a gross sum, the excess of the fees of his office in compensation for the expense of providing new indexes for the records of his office in lieu of others worn out.

Appeal from the District Court of Tarrant. Tried below before Hon. M. E. Smith.

*O. S. Lattimore, J. G. Browning, and J. C. Smith, for appellant.*

*C. R. Bowlin, Capps & Canty, W. P. McLean, W. A. Hanger, and Geo. W. Armstrong, for appellees.*

CONNER, CHIEF JUSTICE.—This suit was instituted by the appellant



county in one of its district courts on April 13, 1903, against the appellee W. E. Butler and sureties on his official bonds as county clerk of said county, to recover about the sum of \$18,000, claimed to be due appellant by virtue of the terms of an act of the Legislature of this State approved June 16, 1897, and commonly known as the "fee bill."

It appears from the averments of appellant's petition that the appellee Butler was duly elected and qualified as clerk of the County Court of Tarrant County in November, 1898, and continued to act as such until in November, 1900, when was again elected and again qualified as such clerk, continuing to act as such until the election and qualification of a successor in November, 1902. While not distinctly averred, it seems to be assumed in the pleadings, as it was upon the presentation of this cause before us, that Tarrant County comes within that classification of counties in this State, as prescribed by section 10 of the fee bill, wherein the clerk of the county court is allowed a maximum compensation for services of \$2500 per annum, plus one-fourth of the fees collected by him in excess of said \$2500, after payment of deputies and office expenses.

Appellant alleges in substance that said Butler, during the first three years he so held office, collected, as fees of office, about the sum of \$5000 in excess of all sums to which he was entitled as compensation, which he has refused to pay to the treasurer of the appellant county; that during the last fiscal year he so held office he collected as fees about the sum of \$5000 in excess of all sums allowed him by law, which was not accounted for as should have been done, and also by virtue of a contract made with the Commissioners Court of Tarrant County, made "new set of indexes to deed records and other public records of said county to take the place of old worn-out indexes to said records that were worn out by the ordinary use of the public before said Butler's term of office," for which he was paid the further sum of \$8000. It was in effect alleged that the making of such indexes was necessary, and such work as is required by law of the county clerk, and appellant sought to recover the several sums specified.

So far as necessary here to notice, appellees pleaded in answer by exception and otherwise that the fee bill invoked by appellant is violation of sections 48 and 51, article 3, of the Constitution; and that appellee Butler had made settlement with the Commissioners Court of the appellant county of all matters involved in this suit accruing before November 30, 1901. The trial court sustained the appellee's plea of settlement, and also appellees' exceptions to the effect that said fee bill was unconstitutional and violative of the sections noted, and hence gave the judgment for appellees from which this appeal has been prosecuted.

If the act of the Legislature, the fee bill, is opposed to the fundamental, the paramount law of the State, it of course must give way. In such event the judgment should be affirmed; for in this contingency the fees of office collected by the county clerk would, perforce of prior en-



actments, belong to him, to the exclusion of the appellant county. We will therefore first determine the objections to the fee bill, and to this end make the following brief epitome of the sections of the Constitution and of the legislative act involved.

Section 48, article 3, of the Constitution declares that the Legislature "shall not have the right to levy taxes or impose burdens upon the people," except for purposes therein specified relating to the State government, which in no instance includes appropriations or donations for the benefit of counties or county officers. Section 51 of the same article of the Constitution provides that, "The Legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporation whatsoever; provided, that this shall not be so construed as to prevent the grant of aid in case of public calamity."

The fee bill (see Gammel's Laws of Texas, vol. 10, bot. p. 1445 et seq.) prescribes certain fees that may be taxed and collected by designated officers, including clerks of the county courts, for the performance of designated official acts, but further provides, in section 10, that, "The maximum amount of fees of all kinds that may be retained by any officer mentioned \* \* \* as compensation for services shall be as follows \* \* \* in counties containing a city of over 25,000 inhabitants, or in which there were cast at the last presidential election as many as 7500 votes, or by the census of 1900 shall contain as many as 37,500 inhabitants, \* \* \* clerk of the county court \* \* \* \$2500 per annum. \* \* \* The amounts (section 11) allowed to each officer mentioned \* \* \* may be retained by him under existing laws; but in no case shall the State or county be responsible for the payment of any sum when the fees collected by any officer are less than the maximum compensation allowed by this act, or be responsible for the pay of any deputy or assistants. Which officer mentioned \* \* \* shall at the close of each fiscal year make to the district court of the county in which he resides a sworn statement showing the amount of fees collected by him during the fiscal year, and the amount of fees charged and not collected, and by whom due, and the number of deputies and assistants employed by him during the year, and the amounts paid or to be paid each; and all fees collected \* \* \* during the fiscal year, in excess of the maximum amount allowed and of the one-fourth of excess of the maximum allowed for their services of their deputies or assistants, \* \* \* shall be paid to the county treasurer of the county where the cost accrued." The law under consideration has other provisions that we do not consider it necessary here to notice.

Appellees' principal contentions are to the effect that the fee bill changes the method prescribed by the Constitution for compensating the officers therein named, and is an indirect attempt to impose by law a tax or burden on the people required to pay the excess fees therein provided for, and is hence inhibited by section 48, article 3, of the Constitution. Also that the excess required by the act to be paid to the county treas-



urer constitutes public funds belonging to the State, and that the payment thereof to such treasurer for the use of the county amounts to a grant of public money to a municipal corporation in violation of said section 51, article 3, of the Constitution.

Section 20, article 5, of the Constitution provides that, "There shall be elected for each county, by the qualified voters, a county clerk, who shall hold his office for two years, who shall be clerk of the county and commissioners courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the Legislature." The power thus given the Legislature to prescribe the "duties, perquisites and fees" of clerks of the county courts is general and without limitation. No other provision of the Constitution specifically relating to the subject is to be found, and we think, therefore, it is not to be inferred or held that the fee bill under consideration is invalid because of the method therein adopted of fixing and limiting the compensation of clerks in the counties to which it applies. We think it can not be said that the fee bill plainly, if at all, places such officers upon the basis of a salary contrary to the asserted general scheme of the Constitution that their compensation shall be fixed by fees of office. But if so, and conceding that such is the general scheme, in view of the unrestricted power and legislative discretion specifically conferred by the section of the Constitution from which we have quoted, conflicts by mere implication with other provisions not relating to the subject are not to be entertained. For no principle of statutory construction is more firmly established than that legislative acts must be held valid unless prohibited by the Constitution in express terms, or by necessary implication. *Lytle v. Halff*, 75 Texas, 132; *Whitner v. Belknap*, 89 Texas, 279; *Railroad Commission v. Railway Co.*, 90 Texas, 349.

Nor can we sustain the contentions that the fee bill is a form of levying a tax imposing burdens and granting public moneys contrary to the provisions of sections 48 and 51, article 3, of the Constitution. Such was manifestly not the legislative purpose. As matter of public history relating to the subject, we know that prior to the enactment in question in certain populous counties the compensation of certain officers therein arising from fees fixed by existing laws was enormous and out of all proportion to the value of the service rendered and to compensation received by the great majority of officers in the State, including the highest, and the fee bill manifests the legislative purpose to correct the evil growing out of excessive salaries or fees and to equalize or make uniform, as far as possible, the compensation of all officers performing like public service, and thus to conform, in spirit at least, to section 3, article 1, of the Constitution, which declares that, "All free men when they form a social compact have equal rights, and no man, or set of men, is entitled to exclusive public emoluments or privileges, but in consideration of public services." The fee bill fixes the fees to be collected for the official acts therein designated in accordance with the plan of previous laws, the validity of which has never been questioned, so far as



we know, and merely limits the amounts that may be retained by certain officers as therein specified. In view of the well known fact that in many of the more sparsely settled counties efficient public service could not be secured by fixing fee rates less than as prescribed in the fee bill, it is difficult to see how the beneficial ends desired could have been accomplished in a better way; or at least that another method was required. A constitutional grant of power in general and unrestricted terms, and relating to a specific subject, to fix, as here, the compensation of officers, carries with it the authority to prescribe the method of carrying the power into effect. In other words, the power is coextensive with its terms. *Armstrong v. Railway Co.*, 45 Texas, 265; *Morton v. Gordon, Dallam*, 379. And in such case restrictions are not to be implied, and the method adopted should not be nullified by general provision found elsewhere. *Willis v. Owen*, 43 Texas, 55.

It is true that, as one of the results of the operation of the fee bill, sums in excess of the requirements of the public service may, and probably will, be exacted and collected from persons requiring such service, thus in one sense imposing an unnecessary burden. The citizen, however, has no cause of complaint, inasmuch as the law imposes precisely the same burden upon all persons within its scope securing the same official service. The officer ought not to be heard in complaints that his total compensation is limited to the maximum amount stated, and that he is thus denied a benefit not attainable by all other officers of like class. He deliberately seeks and obtains his office with full knowledge of the terms of the law, and when elected enforces its very terms in the collection of his fees. In the accomplishment of the general good some inequalities may be expected to flow from untried legislation, and it certainly can not be said that at the time of the enactment under consideration the Legislature intended the indirect result above indicated, and designed the act with a view of thereby raising a tax for the benefit of any one or more counties. The result pointed out is but incidental and remote. The proximate result, as well as design, of the fee bill is the attainment of public good. It has often been decided that State legislation relating to its internal affairs is not rendered void by the fact that such legislation may indirectly affect interstate commerce over which no State has direct power of control. Doubtless many other instances and authorities might be cited in illustration of the thought we have here sought to present did time and space permit, but we conclude this branch of the subject by saying that in our opinion the law under consideration ought not to be annulled merely because it may incidentally and indirectly have the effect insisted upon.

What we have said also applies, in part at least, to the contention that the fee bill constitutes an unauthorized grant of public moneys to a municipal corporation in violation of section 51, article 3, of the Constitution. It is possibly worthy of notice that the fee bill in express terms does not declare that the excess fees therein specified shall become the property of the county. It simply provides that the officer



shall pay such excess to the county treasurer, without direction as to its further use or appropriation. Assuming, however, that the excess becomes the property of the county, we can not bring ourselves to the conclusion that the fee bill constitutes a grant of public money in the sense in which these terms are used in section 51, article 3, of the Constitution. It is insisted that in the case of *Ellis v. Thompson*, 95 Texas, 22, our Supreme Court held that the excess under consideration constitutes public moneys. The court does say in the case stated that the fees specified in the act under consideration "are treated as a part of the public revenue to be received by the officer and accounted for as directed." But nothing in the opinion indicates that the Supreme Court had in mind the section of the Constitution now under consideration. While it may be difficult to define the exact status of the excess, or to deny that such excess constitutes public money, it is evident that the Constitution makers had no such fund in mind at the time section 51 was adopted. By "public money," as therein used, the framers of the Constitution most probably meant moneys received by officers of the State and belonging to the State, derived in the ordinary processes of taxation, and in other ways permissible under the Constitution. It seems to us that the provision of the fee bill requiring the officer collecting fees to pay part thereof in a certain contingency only to the county treasurer can in no reasonable sense be said to be a grant of public money to a municipal corporation. At least it is not so clearly so as that we feel willing to declare the act unconstitutional on this ground.

Other constitutional objections are urged, but they have not been stressed, and we think them untenable, and therefore overrule all objections to the law under consideration without further discussion. From which it of course follows that we think the trial court erred in the rulings complained of in the fourth, fifth, sixth, seventh and eighth assignments of error.

The remaining questions relate to the \$8000 item alleged to have been paid W. E. Butler as compensation for making new indexes, as stated in the beginning of this opinion, and to the settlement with the commissioners court for the fiscal year ending November, 1899; November, 1900, and November, 1901. As we understand the allegations, Butler received this \$8000 during the last fiscal year held by him, and hence it in no event could have been included in the settlement with the commissioners court. The settlement pleaded, however, and to which appellant excepted, purports to comprehend all excess fees received by Butler for the first three fiscal years of his entire term. Such settlement is evidenced by what is designated as an order and judgment of the Commissioners Court, which is to the effect that on September 18, 1902, W. E. Butler, as clerk of the County Court of Tarrant County, Texas, had fully paid to the county all sums that he owed Tarrant County for excess and delinquent fees collected by him for and during the years ending November 30, 1899; November 30, 1900, and November 30,



1901, and declared "that such payments to the county shall be and are in full satisfaction of accounts between said W. E. Butler and Tarrant County for said years." The order contains further recitations that we think are without bearing upon the matter under consideration, and which will therefore not be noticed. We can not think that the order or judgment of the Commissioners Court amounts to an estoppel against the county, or precludes the county from the right to recover the full sum to which the county was entitled for the years comprehended within the order. In other words, we think the order was recitative merely, in the nature of a written declaration, and not of the force and effect of a judgment precluding inquiry into the true state of the account. The fee bill required the officer at the close of each fiscal year to return to the district court sworn statements which, if truly made, must have shown the precise amount of excess in fees to which the county was entitled. There is, or should be, no room for controversy, it not being contended or alleged that appellee Butler failed to make such report. The power of the commissioners court invoked (Rev. Stats., art. 1537) " \* \* \* to audit, adjust, and settle all accounts and claims in favor of the county," ought not to be construed as authorizing the county to receive a less sum than was actually due; for the Constitution, section 55, article 3, in effect declares that the Legislature shall have no power to authorize a release or extinguishment of indebtedness of an individual to any county.

If the \$8000 allowed appellee Butler for making indexes, etc., during the last fiscal year of his term constituted fees of office within the meaning of the fee bill, then of course the county was entitled to have this item considered in determining the amount of excess due it. The fee bill requires "all fees collected during the fiscal year," etc., to be accounted for, and fixes a maximum amount of fees of "all kinds" which may be retained. It is insisted, however, that the extra services thus compensated were not official; that compensation for making the indexes was a matter purely of contractual right. We do not think so. As we have observed, the Constitution confers general power upon the Legislature to prescribe the duties of county clerks, and by reference to the Revised Statutes, article 1143, and following, it is apparent that the Legislature has made it the duty of the county clerks to keep and preserve the records of their offices, and to keep proper indexes of all records thereof. The duty to safely keep and preserve the records necessarily confers the right to exclude all nonofficials from interference therewith. The commissioners court would be without power, without consent of the clerk, to authorize a stranger to take possession of the records and perform the services contemplated in the work to which the contract of the commissioners court related. The duty to keep and preserve the indexes also necessarily implies the duty to transcribe, renew or make proper indexes when necessary, as was alleged in appellant's petition; and the compensation therefor seems to have been expressly provided, as will be seen from the following quotation from article



2457, Revised Statutes, viz., "transcribing, comparing and verifying record books of his office, payable out of the county treasury upon warrant issued under the order of the commissioners court, for each 100 words ten cents," which seems not to have been affected by the fee bill, as will be evident by an inspection of the twenty-sixth section thereof, providing that laws not in conflict with the act are not affected. For aught that appears the \$8000 allowed appellee Butler for making new indexes was but the sum total of fees to which he was entitled therefor under existing law, and the settlement indicated by the order hereinbefore referred to amounted only to the ascertainment of this fact. But however this was, we think the \$8000 was official fees within the meaning of the fee bill, for which Butler should be required to account.

Other questions are involved in the exceptions and rulings of the court on the trial, but they are not presented by assignments of error, and we hence do not pass upon them. For the errors noted, however, it is ordered that the judgment be reversed and the cause remanded for a new trial.

*Reversed and remanded.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF  
TEXAS v. T. H. JENKINS ET AL.

Decided April 9, 1904

**1.—Charge—Issues Not Raised.**

It is error for the court to charge with reference to matters not presented by the pleadings and evidence.

**2.—Carriers—Notice to Shipper of Consignee's Refusal to Receive Freight—Damages.**

Where cotton was shipped by rail consigned to "shipper's order, Dallas, Texas, notify W. & Co.," the carrier, if it was its duty to notify the shipper that W. & Co. had refused to receive the cotton, would be liable for decline in the market price of the cotton only from the time it was notified by W. & Co. of their refusal to receive the cotton, or by the exercise of ordinary diligence could have known of such refusal.

**3.—Same—Liability as Warehouseman.**

The carrier, if liable at all, would be liable only as warehouseman if it exercised reasonable diligence in notifying the shipper of the consignee's failure to receive the cotton.

Appeal from the County Court of Denton. Tried below before Hon. I. D. Ferguson.

*J. T. Bottorff*, for appellant.

CONNER, CHIEF JUSTICE.—On the 21st day of February, 1901, appellees delivered to the appellant railway company, at Lewisville, Texas, for shipment, forty bales of cotton, consigned to "shipper's order, Dallas, Texas, notify White & Company." Appellees alleged as a basis for the recovery of the judgment from which this appeal has been prosecuted, that said cotton had been negligently and fraudulently delivered to White & Co. at Dallas, against appellees' wishes and contrary to the contract of shipment made between the parties. It was also alleged that White & Co. had refused to take said cotton; that appellant had negligently failed to notify the appellees of said refusal until the 12th day of March following, to appellees' damage in fall of market price, the amount of the recovery, to wit, \$197.80. Numerous errors are assigned, but we will notice them in a general way only.

We think the first assignment complaining of the following charge given by the court well taken: "You are instructed that it was the duty of the railway company to so carry out its contract and ship said cotton to Dallas in a reasonable time, and to give the notice to White & Co. as agreed upon in the bill of lading." There was neither allegation nor proof that appellant failed to transport the cotton within reasonable time or to give notice to White & Co. of its arrival as agreed upon in the bill of lading. The charge given was hence wholly inapplicable to the real issues in the case. The same conclusion obtains with equal force as to that part of the court's charge complained of in the second assignment of error, viz: "Should you find and believe by a preponderance of evidence that the defendant railway company did deliver the cotton to W. White & Co. without the surrender of the bill of lading to the



railway company and without some other order from plaintiffs to do so, you are here instructed that they would be liable to the plaintiffs for such damages as plaintiffs may have received." We find no evidence of a delivery of the cotton to White & Co., but on the contrary it seems to be undisputed that said company refused to receive the cotton after notice of its arrival. Appellees afterwards, to wit, on the 13th day of March, received the cotton from appellants on demand therefor and sold it, receiving, as alleged, a less price than White & Co. had agreed to pay, the cotton not being damaged in any respect, and appellees sue alone for said difference.

The ground upon which White & Co. refused to take the cotton when notified of its arrival was that it was not of as good grade as contracted for, and the court charged the jury to the effect that if they found that White & Co. had refused to take the cotton, and that the railway company failed to notify appellees thereof, and that appellees suffered a loss in the decline of the price of cotton, they should find for appellees such damages as "they may have sustained." We think this charge, under the facts of the case, subject to objection, and complaint is made of it in the third assignment. There was evidence tending to show that upon the day the cotton was shipped appellees drew draft on White & Co., with bill of lading attached; that upon its presentation through a Dallas bank White & Co. first refused to pay the draft, on the ground that the cotton had not then arrived, and that they wished to examine the cotton. After the arrival of the cotton at Dallas and White & Co.'s refusal to receive it, the draft was protested and returned to the Lewisville bank, of which appellees were notified on March 12th, the appellant company about the same time notifying appellees that White & Co. had refused to receive the cotton. The exact date of the notification to White & Co. of the arrival of the cotton and of the date upon which White & Co. definitely refused to receive the cotton is not shown, and the instruction here under consideration seems inapplicable to the facts. If it be assumed that it was appellant's duty to notify the appellees of White & Co.'s refusal to receive the cotton, they certainly were not required to do so until such time as they were notified, or by the exercise of ordinary diligence could have known, of the fact of such refusal on the part of White & Co. In the absence of the date of White & Co.'s refusal nothing appears establishing negligence on appellant's part in failing to notify appellees. Appellant in no event could be held liable for decline in market, save for the time intervening between the date upon which by the exercise of ordinary care they could have ascertained the fact of White & Co.'s refusal to receive the cotton and could have notified appellees thereof, and the date upon which it was actually sold, nor would appellant company be necessarily liable, as in effect charged by the court, for the decline in market price of cotton generally. If the cotton in fact was of inferior grade, as White & Co. insisted, appellant could be held liable, if at all, only for such decline, if any, of the market value of the cotton shipped. The misleading nature of the charge here discussed



seems to be particularly emphasized in the court's charge on the measure of damage complained of in the fourth assignment. If, as before indicated, it be assumed that it was appellant's duty to notify appellees of White & Co.'s refusal to receive the cotton, they should be held liable only as warehousemen in event they exercised reasonable diligence to give the notification insisted upon.

We do not find the concluding paragraph of the court's charge to be of the effect complained of in the fifth assignment, and other assignments we do not think it necessary to notice.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*



CHICAGO, ROCK ISLAND & TEXAS RAILWAY COMPANY ET AL. v.  
MRS. M. S. RHODES.

Decided April 9, 1904.

**1.—Carrier of Passengers—Explosion of Gas in Car—Liability for Injury.**

Where a railway company makes a contract with a light and power company to supply its cars with gas, and an explosion causing injury to a passenger results from the careless manner in which a servant of the latter company fills the gas tank in a car, the railway company is not excused for its failure to take the proper high degree of care for the safety of its passengers, since its duty to them is to see that the servant of the other company, admitted on its premises to supply its cars with gas, does not do this in such manner as to expose them to danger.

**2.—Same—Joint Tort Feasors.**

The light and power company having undertaken to discharge for the carrier the duty of supplying the cars with gas, thereby placed itself under obligation to the passenger to exercise at least the care of a person of ordinary prudence, and for a breach of this duty it is liable along with the carrier for the consequent injury.

**3.—Damages—Excessive Verdict—Remittitur.**

In an action of damages for personal injury the trial court has the power to correct the error of excess in the verdict by requiring a remittitur.

Appeal from the District Court of Tarrant. Tried below before Hon. Irby Dunklin.

*Capps & Canty*, for appellant Fort Worth Light and Power Company.

*N. H. Lassiter* and *Robert Harrison*, for appellant railway company.

*Wynne, McCart, Bowlin & McCart*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—A gas explosion in one of the Rock Island cars standing in the yards and depot grounds used by it in Fort Worth, Texas, which occurred April 20, 1902, about 7:30 o'clock at night, produced a stampede among the passengers of said railway company, in consequence of which appellee, who was one of them, sustained personal injuries. Besides being badly frightened and prostrated with nervousness, she received a blow of some kind and was rendered unconscious. She recovered a verdict against both the railway company and the Fort Worth Light and Power Company for \$1350, but the court required a remittitur of \$450, and from a judgment for \$900 both companies have appealed, each claiming that the other alone was liable, if liability there was.

The railway company made a contract with the other company to supply the cars of the former with gas, and the explosion took place while the latter was discharging this obligation. After the servant of the light and power company had filled a gas tank on a Rock Island car opposite and next to the car in which appellee was a passenger, he failed to shut off the gas, which caused the explosion in the car. It



was the contention of the railway company that this was due alone to the negligence of the servant of the light and power company; it was the contention of the light and power company that it was due alone to a defective condition of the valve of the car, for which it was in no way responsible. There was evidence to support both contentions, but the preponderance of the evidence was in favor of the railway company.

It does not follow, however, because the explosion may have resulted alone from the awkward and careless manner in which the servant of the light and power company attempted to shut off the gas, as the evidence would have warranted the jury in finding, that this would excuse the railway company for its failure to take proper care for the safety of its passengers. Its duty to its passengers to see that the servant of the light and power company, admitted on its premises to supply the cars with gas, did not do this in such manner as to expose them to danger, was even greater than that of the latter company. It would not do to allow a common carrier of passengers, by contracting with others to discharge its duties, as was done in this instance, to substitute for the very high degree of care imposed by law a less degree of care. It is as much the duty of a common carrier of passengers, such as a railway company, to see that due care is taken in filling the tanks on its cars with inflammable gas as it is to see that its engines and coaches are properly equipped and are supplied with fuel and ice in a proper manner. The passenger has a right to expect of the carrier a high degree of care in the discharge of these incidental duties. *Carpenter v. Boston & A. Ry. Co.*, 97 N. Y., 494, and cases cited in foot notes.

Also, one who undertakes to discharge such duties for the carrier places himself under obligation to the passenger to exercise at least the care of a person of ordinary prudence, and for a breach of this duty is liable for the consequent injury. It is upon this ground that we sustain the judgment against the light and power company. It follows that both companies are liable.

The trial court had the power to correct the error of excess in the verdict by requiring a remittitur. *Fort Worth & D. C. Ry. Co. v. Linthicum*, 33 Texas Civ. App., —, 77 S. W. Rep., 40.

The judgment is affirmed.

*Affirmed.*



## NATIONAL BANK OF COMMERCE V. P. W. KENNEY ET AL.

Decided April 9, 1904.

**Promissory Note—Negotiability Destroyed—Agreement for Indefinite Extension of Time.**

Where a promissory note contained this provision, "The makers and indorsers hereof hereby severally waive protest and nonpayment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to holder," its negotiable quality was thereby destroyed, and a subsequent indorsee who received it before maturity took it subject to the rights of one who held as collateral security a prior note by the same makers, secured by chattel mortgage, for which the note in question was given in substitution and renewal.

Appeal from the District Court of Hemphill. Tried below before Hon. B. M. Baker.

*H. E. Hoover* and *Elijah Robinson*, for appellant.

*I. N. Watson*, *C. H. Kohler*, and *Tempel & Hardy*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—Appellant, a national bank of Kansas City, Mo., declared on a promissory note for \$7259.80, dated Canadian, Texas, November 29, 1899, due 180 days after date, signed by J. H. Kenney as principal and P. W. Kenney and J. W. Lambert as irregular indorsers, payable at Kansas City, Mo., to the order of Ladd, Penny & Swazey, to whom it had been delivered at their office in Kansas City, Mo., by the makers, who were citizens of Texas, secured by a duly registered chattel mortgage on cattle in Texas, which mortgage appellant sought to foreclose. Ladd, Penny & Swazey seem to have delivered the note to appellant, though without indorsement, as collateral security for a pre-existing loan of \$50,000, most of which remained unpaid at the institution of this suit, Ladd, Penny & Swazey having become insolvent. In February, 1900, at the instance of Ladd, Penny & Swazey and for reasons given by them, a new note, dated February 8, 1900, but differing in no other respect from the one declared on, secured by chattel mortgage on the same cattle, was executed by the Kenneys and Lambert as a substitute for the first note. February 19, 1900, this note was sold, indorsed and delivered by Ladd, Penny & Swazey to the Third National Bank of Springfield, Mass., one of the appellees. It was not conclusively shown when the note declared on came into appellant's hands; for while there was evidence tending to show that this occurred prior to the substitution, there was also cogent evidence to the contrary. But however this may be, it was conclusively established by the evidence that neither the makers nor the indorsee of the new note had any notice that appellant held or claimed the old note until long after the substitution and sale of the new one.

In no view of the case was appellant entitled to recover unless the instrument declared on was a negotiable promissory note, since both according to the Missouri statutes read in evidence and the Texas



statutes, if it is nonnegotiable, it was subject to every defense which it would have been subject to in the hands of Ladd, Penny & Swazey, appellant having failed to give any notice of the alleged assignment to it until long after the substitution and sale of the new note, the effect of which was to destroy the old one. The negotiable quality of the note is denied because it contained this provision: "The makers and indorsers hereof hereby severally waive protest and nonpayment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to holder." That this language introduced an element of uncertainty as to the time of payment fatal to the negotiability of the note is a proposition of commercial law too well sustained by the authorities to warrant us in holding to the contrary, as will be seen from the following cases, in the first of which the language construed was identical with that quoted: *City National Bank v. French* (Kan.), 72 Pac. Rep., 842; *Glidden v. Henry*, 104 Ind., 278, 54 Am. Rep., 316, 1 N. E. Rep., 369; *Second National Bank v. Wheeler*, 75 Mich., 546; *Bank v. Piollett*, 126 Pa. St., 194, 17 Atl. Rep., 603, 4 Law. Rep. Ann., 190; *Woodberry v. Roberts*, 59 Iowa, 358, 13 N. W. Rep., 312, 44 Am. Rep., 685; *Coffin v. Spence*, 39 Fed. Rep., 262; *Smith v. Van Blarcom*, 45 Mich., 371, 8 N. W. Rep., 90; *Oyler v. Murray*, 7 Ind. App., 645, 34 N. E. Rep., 1004; *Rosenthall v. Rambo* (Ind.), 62 N. E. Rep., 63; *Bank v. Frazee*, 9 Ind. App., 645, 36 N. E. Rep., 378.

The case of *City National Bank v. Commission Co.*, 93 Mo. App., 123, recently decided by the Kansas City Court of Appeals, is the only case cited by appellant in its elaborate brief of fifty-eight pages to support the opposite view, and it is inaccessible.

In *Anniston L & T. Co. v. Stickney*, 108 Ala., 46, 19 So. Rep., 63, a note providing for a six months extension at the option of the holder was held to be negotiable, but the case was distinguished from the line of cases above cited, in that the extension provided for was for a definite time. See also *Capron v. Capron*, 44 Vt., 410, and *Insurance Co. v. Bell*, 31 Conn., 534, which may seem at variance with some of those we have cited, especially the latter, which, however, was by a divided court.

The judgment denying the recovery sought is therefore affirmed.

*Affirmed.*



## N. E. BOOHER V. H. C. ANDERSON ET AL.

Decided April 9, 1904

**Practice on Appeal—Filing Briefs.**

Where appellant has failed to file brief in the appellate court and offers no excuse for his failure to file it in the court below twenty days before the day set for the submission of the case, his application for leave to file brief will be refused and the appeal dismissed. Following *Harris v. Bryson*, 31 Texas Civ. App., 514.

Appeal from the District Court of Eastland. Tried below before Hon. J. H. Calhoun.

*J. R. Stubblefield*, for appellant.

*Frost & Chartain*, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—This appeal must be dismissed for want of prosecution; no brief having been filed for appellant in this court, and no excuse having been offered for his failure to file a brief in the court below at least twenty days before the day set for the submission of the case, as will be seen from the following statement: The transcript was filed November 28, 1903, and an order was made March 12, 1904, setting down the appeal for submission on April 2, 1904. Not until March 21, 1904, which was less than twenty days before submission day, and even after a motion to dismiss the appeal had been made, did appellant file any brief in the District Court. In his application for leave to file brief in this court notwithstanding his failure to file brief in the District Court within the prescribed time, no excuse whatever was offered for the delay.

The case comes clearly within the ruling made by the Court of Civil Appeals for the Third District in *Harris v. Bryson*, 31 Texas Civ. App., 514, in which writ of error was denied. The application for leave to file brief is therefore overruled, and the motion to dismiss appeal is sustained.

*Dismissed.*



## WESTERN UNION TELEGRAPH COMPANY v. W. A. BUCHANAN.

Decided April 9, 1904.

**Telegraphs—Interstate Message—Lex Loci—Mental Suffering.**

Where a message was delivered to a telegraph company at a point in Arkansas for transmission to a point in Texas, a recovery for damages for mental suffering resulting from a failure to deliver the message could not be had in the Texas courts, since the contract is governed by the law of the place where it is made, and the law of Arkansas does not authorize a recovery of damages for mental suffering alone in such a case. Following *Telegraph Co. v. Waller*, 96 Texas, 89.

Appeal from the District Court of Fannin. Tried below before Hon. P. C. Thurmond, Special Judge.

*Geo. H. Fearons, Davis & Garnett, and N. L. Lindsey*, for appellant.

*Gross & Gross*, for appellee.

RAINEY, CHIEF JUSTICE.—Appellee sued to recover of the appellant damages for the failure to deliver to him a message announcing the serious illness of his mother, which proved fatal.

The message was received by appellant at Clarendon, Ark., for transmission and delivery at Honey Grove, Texas, to appellee. Appellant plead the general issue, and specially, among other things, that the contract was made in and governed by the laws of Arkansas; that no recovery should be had under the laws of said state, and therefore no recovery could be had in this State. Appellee recovered; hence this appeal.

The evidence shows that a message was received by appellant at Clarendon, Ark., to be transmitted and delivered at Honey Grove, Texas, to appellee. The message was transmitted to Honey Grove, but appellant's agent there negligently failed to deliver same, which caused the damages assessed by the jury. Under the laws of Arkansas no recovery could be had for mental anguish, as is here sought.

Appellant presents here, in effect, but one contention, and that is, that the contract having been made in Arkansas, the laws of that State govern; and as no recovery could be had under the laws of that State, none can be had in this State. This contention is sustained by the case of *Telegraph Co. v. Cooper*, 29 Texas Civ. App., 592, 62 S. W. Rep., 427, decided by the Court of Civil Appeals, Second District, and a writ of error refused by our Supreme Court. Subsequently in *Telegraph Co. v. Waller*, 96 Texas, 589, 74 S. W. Rep., 751, the Supreme Court approved the principle announced in the Cooper case. In the Cooper case the message was received by the company at a point in Texas to be transmitted and delivered at a point in the Indian Territory, where damages for mental anguish are not recoverable. The message was transmitted to the Indian Territory but the company failed to deliver it to the addressee. It was held that the laws of Texas governed in that



character of case, and a recovery was permitted. That decision was based on the principle announced in the case of Reed v. Telegraph Co., 37 S. W. Rep. (Mo.), 907, where the facts are the same as here.

The principle on which the decisions cited is based is that contracts are to be governed by the law of the State where entered into, unless a different intention is expressed or implied by the contract. Telegraph Co. v. Christensen, 78 S. W. Rep., 744.

In the case of Telegraph Co. v. Blake, 68 S. W. Rep., 526, the facts are identical with the facts of this case, and the court there held that a recovery could be had. The reasons there given by Judge Neil, who rendered the opinion, appear plausible, if not correct, and we would be inclined to follow them were it not for the holding in the Cooper case, which has been twice approved by our Supreme Court, once in refusing a writ of error and then adhering to that doctrine in the Waller case. We are governed by the decision of the Supreme Court, and believing the holding in Cooper and Waller cases to be contrary to a right of recovery in this case, and there being no controversy arising on the facts the judgment herein will be reversed and judgment here rendered for appellant.

*Reversed and rendered.*

#### ADDITIONAL CONCLUSIONS OF FACT.

The fee of 50 cents for transmitting the message was paid to the appellant at Clarendon, Ark., by Walter Buchanan, who was acting for the appellee. W. A. Buchanan, appellee, at the time was residing at Honey Grove, Texas.



## JOHN A. DONALDSON V. J. H. DOBBS ET AL.

Decided April 13, 1904.

**1.—Interrogatories to Party—Refusal to Answer.**

Where the refusal of a party to the suit to answer interrogatories propounded by his adversary is made under a belief that he was entitled to demand witness fees and followed by timely offer to answer on learning better, it should not be treated as an admission.

**2.—Hearsay.**

Evidence excluded as hearsay and self-serving declarations.

**3.—Evidence—Impeachment.**

Proof that a party, testifying in the case, had been, in various church trials, charged with and found guilty of unministerial conduct, embezzlement, slander, and false swearing, was not admissible.

**4.—Restricting Number of Witnesses.**

It is within the discretion of the court to limit the number of witnesses to a given point, and his action in refusing to permit more than six impeaching witnesses was not ground for reversal unless there was something else to show abuse of his discretion.

Appeal from the District Court of Grayson. Tried below before Hon. J. M. Pearson.

*J. W. Finley*, for appellant.

*S. B. Cox* and *Don A. Bliss*, for appellees.

**EIDSON, ASSOCIATE JUSTICE.**—This was an action brought by the appellant against appellees to recover the sum of \$400, alleged to be the amount of the purchase money for a certain lot in the city of Sherman, claimed to have been sold by appellant to appellees, and for the foreclosure of his vendor's lien upon said lot. Appellees answered by general demurrer and general denial. The case was submitted to the court without a jury, and judgment rendered against appellant and for the costs of suit.

The first assignment of error complains of the action of the court below in sustaining the motion of appellees to vacate the notary's certificate to the ex parte interrogatories propounded to appellees, and in not allowing appellant to read said interrogatories as confessed in evidence on the trial. It appears from the motion of appellees filed in the court below to vacate said certificate, that their refusal to answer said interrogatories was based upon their belief in good faith that they were entitled to witness fees before they could legally be required to answer said interrogatories; and that the day after the notary called on them to answer said interrogatories they offered to answer them, but the notary had in the meantime returned the interrogatories to the clerk of the court. And it further appears that appellees again offered to answer said interrogatories before the trial began and before they or their attorneys had ever seen such interrogatories.

We think that it does not appear that the refusal upon the part of



appellees to answer said interrogatories when they were called upon to do so was willful or contumacious; and therefore the court below did not err in vacating said certificates. *Bounds v. Little*, 75 Texas, 316; *Robertson v. Melasky*, 84 Texas, 559; *Wofford v. Farmer*, 90 Texas, 655; *Texas & P. Ry. Co. v. Winder*, 31 S. W. Rep., 715; *Rushing v. Willis*, 28 S. W. Rep., 921.

It appears from appellant's bill of exceptions number 2 that appellant offered to prove by the deposition of J. S. Means that in December, 1901, the said Means had a talk with appellant in which he, appellant, stated to witness that he expected to sell the two lots to the pastor of his church, appellee herein, for \$200 per lot, and asked witness if he would release the lots to him, and the best of witness' recollection was that he wrote witness about it in another letter not attached to the cross-interrogatories, and that it was the understanding of witness that appellee was to pay \$200 per lot, and that the court, on objection by appellees, excluded such testimony.

It appears very clearly that said testimony was hearsay and self-serving; and therefore the court properly excluded same.

The appellant offered to prove by appellee J. H. Dobbs that prior to his coming to Sherman he had lived in Butler and Chillicothe, Mo., and Palestine, Texas; that at each of those places he had trouble with his church and was charged with unministerial conduct; that at Chillicothe he was charged with embezzlement; that he was charged with slander at Palestine, and that he was charged at Sherman with false swearing; that he was tried on said charges at said several places by his churches, and that he was found guilty on all of said charges.

The court on objection by the attorneys of appellees, refused to admit in evidence this testimony, to which action of the court the appellant reserved his bill of exceptions number 3. It appears to be well settled that in civil cases this character of testimony is inadmissible. *Missouri K. & T. Ry. Co. v. DeBord*, 21 Texas Civ. App., 691, 53 S. W. Rep., 593; *Crawleigh v. Galveston H. & S. A. Ry. Co.*, 28 Texas Civ. App., 395, 67 S. W. Rep., 142; *Gulf C. & S. F. Ry. Co. v. Johnson*, 83 Texas, 633; *Hill v. Dons*, 37 S. W. Rep., 638; *Freedman v. Bonner*, 40 S. W. Rep., 47; *Kruger v. Spachek*, 22 Texas Civ. App., 307, 54 S. W. Rep., 295.

The appellant in his fourth assignment of error complains of the action of the court below in restricting the number of impeaching witnesses to six, and in refusing to allow appellant to examine Andrews and the other impeaching witnesses tendered by him.

This is a matter that is entirely within the discretion of the court trying the case, and unless there is something to show that this discretion has been abused, this court is not authorized to revise the action of the trial court. There is nothing in the record to show any abuse of such discretion; and we therefore hold that the action of the court in the respect mentioned was not error.



The other assignments of error relate to the sufficiency of the testimony to support the judgment of the court. We are of opinion that it appears from the record that the testimony is sufficient to sustain such judgment, and said assignments of error are all overruled.

Finding no reversible error in the record, the judgment of the court below is affirmed.

*Affirmed.*

Writ of error refused June 9, 1904.



## WESTERN UNION TELEGRAPH COMPANY v. DICK BRYANT ET AL.

Decided April 13, 1904.

**Telegram—Delivery.**

The undertaking of a telegraph company with the sender of a message being for personal delivery to the addressee, and not carried out by reason of the failure of the sender to pay the charges beyond free delivery limits when notified thereof, the fact that the message was addressed by the operator to the care of another person, within free delivery limits, to enable the proper address to be ascertained by the company from him, did not make it the duty of the company to deliver to such other person; and parol evidence was admissible to explain the true contract and why the message was addressed in his care.

Appeal from the District Court of Upshur. Tried below before Hon. R. W. Simpson.

*Young & Stinchcomb* and *Geo. H. Fearons*, for appellant.

*Warren & Briggs*, for appellee.

KEY, ASSOCIATE JUSTICE.—This is a suit to recover damages for mental anguish caused by the failure to deliver a telegram. From a verdict for the plaintiff for \$500 the defendant has appealed, and the case is submitted in this court on the judge's findings of fact, which are as follows:

"1. The message read: 'Ashland, Texas, March 6, 1903.—To Dick Bryant, Care John King, Grand Saline, Texas: Come at once. Papa was killed by train this morning. (Signed) Jno. Purdy.'

"2. At the request of John Purdy, Bun Roe and Jack Overstreet went to the office of defendant at Ashland, Texas, to send the message to Dick Bryant, for the purpose of having Mrs. Ada Bryant, Dick Bryant's wife, come to the burial of the person mentioned in the message as "papa," the deceased being Joe Barnes, the father of Mrs. Ada Bryant.

"3. At the time the message was filed, Jack Overstreet and Bun Roe told the defendant's agent at Ashland that Mrs. Ada Bryant was the daughter of the person mentioned in the message as being killed, and told said agent that the message was being sent for the purpose of having Mrs. Ada Bryant come to his funeral.

"4. When Jack Overstreet and Bun Roe went to the defendant's office at Ashland to send the message, they told the defendant's agent they wanted the message delivered to Dick Bryant, and that John King could give information as to where to find Dick Bryant, and the defendant's agent understood that they wanted the message delivered to Dick Bryant.

"5. The words 'Care John King' in the message were written by defendant's agent at Ashland, Texas.

"6. On March 6, 1903, the defendant company had regularly estab-



lished free delivery limits at Grand Saline, Texas, which were one-half mile each way from defendant's Grand Saline office, and on said day Dick Bryant was not within such free delivery limits.

"7. When defendant's agent at Ashland accepted the message for transmission, Jack Overstreet paid the charges for transmitting the message to Grand Saline, and it was understood between Jack Overstreet, Bun Roe and the defendant's agent, that defendant's agent should find out what the special delivery charges would be to have the message delivered to Dick Bryant, and that they would call back that afternoon and the agent could tell them what it would cost to have the message delivered to Dick Bryant.

"8. The defendant's Ashland agent transmitted the message, as written, to Grand Saline, and sent a service message following it, asking what the special delivery charges would be to deliver the message to Dick Bryant. The defendant's agent at Grand Saline informed the defendant's Ashland agent that it would cost \$2 to deliver the message to Dick Bryant. Overstreet returned to the defendant's Ashland office that afternoon to find what the special delivery charges would be; the defendant's agent informed him, but Overstreet did not pay the amount.

"9. The special delivery fee of \$2 was not paid, nor was there any contract between the agent and the senders that it would be paid.

"10. John King was within the defendant's regularly established free delivery limits at Grand Saline on March 6, 1903, and by ordinary care the defendant's Grand Saline agent could have delivered the message to him.

"11. The message could, with ordinary care, have been delivered to John King on March 6, 1903, in reasonably sufficient time for the message then to have been sent to Dick Bryant and for Dick Bryant and his wife to go to Grand Saline and take a train that, with its connections, would put them in Ashland in time for the burial of Joe Barnes, and that they would have gone to said burial, if they had so received the message.

"12. At about 3 o'clock p. m. of March 6, 1903, John King was informed that defendant's Grand Saline agent had a message addressed to Dick Bryant in his care, and was informed that the message contained information that Dick Bryant's father had been killed. King did not go to the defendant's Grand Saline office and ask for the message, nor did he take any steps towards sending Bryant any word about the message, though he had plenty of time, after being informed of the message, to send Bryant the message or word about the message, in time for Bryant and his wife to go to Grand Saline and take a train that would, with its connections, place them at Ashland in time for the burial.

"13. Mrs. Ada Bryant suffered mental anguish by reason of not being at the burial of her father."

*Opinion.*—In addition to the facts found by the court in the fourth



and fifth paragraphs of the findings, there was clear and uncontradicted testimony given by the plaintiff's two witnesses who acted for John Purdy in sending the message, and appellant's agent who received and transmitted it, to the effect that it was understood and agreed between them at the time the message was sent, that it was not to be delivered to John King, and his name was placed on the message as a mere matter of reference to enable appellant's agent at Grand Saline to ascertain where Dick Bryant resided.

This court holds that the parol evidence referred to was admissible, and that it establishes facts showing that appellant did not agree and was not bound to deliver the message to John King. *Western U. Tel. Co. v. Barefoot*, 97 Texas, 159, 76 S. W. Rep., 914. This holding leads to the conclusion that appellees have no cause of action against appellant; and therefore the judgment appealed from will be reversed and judgment here rendered for appellant.

*Reversed and rendered.*



## CONSUMERS COTTON OIL COMPANY v. JENNIE GENTRY ET AL.

Decided April 13, 1904.

**1.—Contributory Negligence—Specific Charge.**

Evidence held sufficient to require the submission of a requested charge submitting the specific issue of contributory negligence arising thereon, in case of an employe of a cotton oil company injured by being caught in conveyor.

**2.—Same—Notice of Danger.**

Charge on contributory negligence of an employe in an oil mill in choosing a dangerous path about the building instead of a safe one, held properly refused because ignoring the element of knowledge on his part of the danger.

Appeal from the District Court of Hunt. Tried below before Hon. T. D. Montrose.

*W. J. J. Smith, Garnett & Smith, and Horace B. Williams, for appellant.*

*Bennett & Jones, for appellees.*

KEY, ASSOCIATE JUSTICE.—Mrs. Jennie Gentry brought this suit for herself and as next friend for her minor children, to recover damages from Consumers Cotton Oil Company, alleging that on account of the negligence of the latter, J. A. Gentry, the husband and father of the plaintiffs, lost his life. There was a jury trial resulting in a verdict and judgment for the plaintiffs, and the defendant has appealed.

The testimony shows that J. A. Gentry was employed by the defendant as night watchman in its oil mill; that while attempting to go from one end of the seed room to the other in the discharge of his duties, one of his feet was caught in what is termed the conveyor, and he was thereby injured in such manner as caused his death a few hours thereafter.

The defendant in its answer charged that J. A. Gentry was guilty of contributory negligence; and the court instructed the jury, in general terms, if they so found, to return a verdict for the defendant, and refused to give the following instruction requested by the defendant:

"If you find and believe from the evidence that the deceased, J. A. Gentry, was on or was trying to get on the pile of cotton seed beside the conveyor, and that the cotton seed slipped, and on that account the said J. A. Gentry fell into the conveyor, and if you believe that in being on said seed or in trying to get on said seed at the place he was in that he failed to use such care as a person of ordinary prudence would have used under similar circumstances, then the said J. A. Gentry was guilty of contributory negligence, and you will find for the defendant."

The refusal of this charge is made the subject of complaint in this court by the third assignment of error, which we hold to be well taken.



It is true, there was no direct testimony showing that J. A. Gentry was attempting to get on the pile of cotton seed by the conveyor at the time of the accident; but it is also true that no witness saw him at that time, nor did any witness undertake to tell exactly how he got into the conveyor; and one witness testified that when he arrived, about twenty minutes after the occurrence, he discovered that the seed was tramped down some on the east side of the conveyor box. Inasmuch as no witness saw the accident, and no one could say just what the deceased was doing at the time, we think the defendant was entitled to have the theory of contributory negligence referred to in the special charge specifically submitted to the jury. And as the court's charge did not so specifically submit that question, and as the special instruction was properly framed, we hold that the court erred in refusing it. *Gulf C. & S. F. Ry. Co. v. Shieder*, 88 Texas, 152; *Missouri K. & T. Ry. Co. v. McGlamory*, 89 Texas, 639; *St. Louis S. W. Ry. Co. v. Casseday*, 92 Texas, 525.

Appellant also complains of the refusal of the court to give a special instruction applying the law specifically to the question of contributory negligence upon the theory that J. A. Gentry could have gone by a safe route to the other end of the building by going around the conveyor and pile of seed. The testimony presented the question referred to, but this court holds that the requested instruction on that subject, set out in the eighth assignment of error, was not correctly framed, because it did not require the jury to find that J. A. Gentry had notice of the danger involved in going upon the conveyor, and eliminated the question of proximate cause.

All assignments presenting other questions of law are overruled.

We express no opinion as to the merits of the case as developed by the testimony.

For the error indicated the judgment is reversed and the cause remanded.

*Reversed and remanded.*



NEW YORK LIFE INSURANCE COMPANY v. PATTERSON &  
WALLACE ET AL.

Decided April 13, 1904.

**Bank Draft—Assignment of Deposit—Garnishment.**

Evidence considered and held to show an assignment of a bank deposit by the execution by the depositor of a draft thereon as payment on an existing indebtedness, as against garnishment served at suit of other creditors of the depositor after the execution of the draft and before presentation and acceptance.

Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*Crane, Greer & Wharton*, for appellant.

*Burgess & Burgess*, for appellees.

EIDSON, ASSOCIATE JUSTICE.—Appellant sued C. T. Richardson and others in the District Court of Dallas County, in cause No. 21,908, for the sum of \$25,000, and on the 7th day of November, 1902, made application for a writ of garnishment in the usual form against the American National Bank of Dallas, alleging that Willis Meredith, one of the defendants in cause No. 21,908, who had been using a number of aliases, among others that of W. Mannering or Ward Mannering, had funds deposited in the said American National Bank. The writ of garnishment was issued and served on the bank the same day.

The American National Bank answered, in substance, that it had funds in hand amounting to \$283, which said Ward Mannering had placed in its vaults as a general deposit. It also alleged that Patterson & Wallace, a firm composed of C. B. Patterson and George E. Wallace, of the county of El Paso, State of Texas, claimed that the amount deposited by the said Ward Mannering, or some portion thereof, belonged to them. The bank then asked that Patterson & Wallace be made parties, and the question settled as to the ownership of the funds.

Patterson & Wallace filed their plea of intervention on April 6, 1903, claiming \$275 of said funds in said American National Bank, by reason of an alleged assignment thereof to them, made by the said Ward Mannering on the 6th day of November, 1902.

The only question in the case is as to whether the evidence supports the judgment of the court below. The case was submitted to the court without a jury, and the following facts were agreed to and proven:

"1. That the New York Life Insurance Company has a valid judgment against Ward Mannering for a sum largely in excess of the money admitted by the garnishee to be in its hands, to wit, for the sum of \$25,000, and that the writ of garnishment served on the garnishee was issued out of the case in which said judgment was rendered.



"2. That on November 6, 1902, Ward Mannering was under arrest in El Paso, Texas, charged with criminal offense against the laws of the State. That Patterson & Wallace were and are practicing attorneys at El Paso, Texas, and as such were on said date employed by the said Ward Mannering to defend him against said criminal charge.

"3. That on said date the said Ward Mannering executed and delivered to the State National Bank of El Paso, Texas, the following draft: '\$250. El Paso, Texas, Nov. 6, 1902.—At sight, pay to the order of the State National Bank of El Paso, Texas, two hundred and fifty dollars, value received, and charge to account of, with exchange. Ward Mannering. To American National Bank, Dallas, Texas.'

"That said draft was by said Ward Mannering delivered to his said attorneys, Patterson & Wallace, and was by said attorneys delivered to the State National Bank of El Paso.

"4. That after the execution and delivery of said draft, the State National Bank of El Paso sent the following telegram to the American National Bank at Dallas, Texas, to wit: 'El Paso, Texas, November 6, 1902.—Am. Nat. Bank, Dallas, Texas: Will you pay draft on you by Ward Mannering for two hundred and fifty dollars? (Signed) State Nat. Bank.'

"5. That said telegram was received by the American National Bank at Dallas, Texas, at 12:52 p. m., November 6, 1902. And said American National Bank at 1 p. m. on the same date replied thereto by telegram, as follows: 'Dallas, Texas, November 6, 1902.—State National Bank, El Paso, Texas: Ward Mannering's account is good now for two hundred and eighty-three dollars. The Am. Nat. Bank.'

"That said last telegram was received by the State National Bank at El Paso, Texas, on the afternoon of the same day it was sent.

"6. That after the receipt of the said telegram by the State National Bank, the said Ward Mannering executed and delivered to the said State National Bank another draft for the sum of \$25, and delivered the same to the said Patterson & Wallace, as the first, and which said draft was by the said Patterson & Wallace delivered to the said bank, and is as follows: '\$25. El Paso, Texas, Nov. 6, 1902.—At sight pay to the order of the State National Bank of El Paso, Texas, twenty-five (\$25) dollars, value received, and charge to account of, with exchange. Ward Mannering. To American National Bank, Dallas, Texas.'

"7. That on the said 6th day of November, 1902, and about one hour after the said American National Bank had sent to the State National Bank the telegram above quoted, the said American National Bank sent to the State National Bank a second telegram, stating, in substance, that it had learned that a writ of garnishment would probably be served upon it in behalf of the New York Life Insurance Company and against the said Ward Mannering.

"8. That on the evening of the 6th day of November, 1902, the State National Bank of El Paso forwarded, by due course of mail,



the two drafts above described to the American National Bank at Dallas for payment, and that the said drafts reached the American National Bank at Dallas on the morning of November 8, 1902.

"9. That on the 7th day of November, 1902, the writ of garnishment under which the New York Life Insurance Company claims the money in this case was served upon the garnishee, the American National Bank, the said drafts being then in transit by the United States mail, at some point between El Paso, Texas, and Dallas, Texas. That on the morning of November 8, 1902, when said drafts reached the American National Bank at Dallas, and were presented, payment thereof was refused by the said bank, because the writ of garnishment issued in this cause had been served upon it the day before, and said drafts were duly protested for nonpayment and returned to the State National Bank at El Paso, Texas, the protest fees upon each draft amounting to \$3.54, or a total of \$7.08, which was paid by Patterson & Wallace. That after said protest and after the return of said drafts to the State National Bank, it indorsed the same as follows: 'Pay to the order of Patterson & Wallace, without recourse. State National Bank, by Cashier;' and thereafter delivered same to said Patterson & Wallace.

"10. As to the question of the intention of the said Ward Mannering in the execution and delivery of said drafts to the State National Bank, and as to whether it was the intention of the said Ward Mannering to thereby assign said funds in the said American National Bank to said Patterson & Wallace, no agreement is reached herein. But depositions may be taken upon that point, subject to all objections by the New York Life Insurance Company, except such as may be specially waived upon the interrogatories, in answer to which the depositions are to be taken. And after that shall have been done, the following questions will be submitted for the decision of the court:

"Did the execution and delivery of the drafts aforesaid, under the circumstances above recited, and their being forwarded to Dallas, supplemented by the facts stated in the depositions, constitute an assignment of said funds in the American National Bank to the said Patterson & Wallace; and did it constitute an appropriation of the same to the payment of the said drafts, or did the New York Life Insurance Company, by service of the writ of garnishment upon the American National Bank, under the circumstances stated, give to it the superior right to the money then in the hands of the said bank, to be applied upon its judgment against the said Ward Mannering?

"April 13, 1903. The New York Life Insurance Company, Plaintiff, by Crane, Greer & Wharton, Attorneys. Patterson & Wallace, by Burgess & Burgess, Attorneys.

"L. M. Turner, a witness for the interveners, Patterson & Wallace, testified that he was receiving teller of the State National Bank of El Paso, Texas, on the 6th day of November, 1902, and that he knew the firm of Patterson & Wallace, though he did not know Ward Mannering; that Wallace was a customer of the bank, and had an account



there, but Patterson was not; that Patterson & Wallace had no firm account with the bank. He also testified that the two drafts mentioned in the agreed statement submitted to the court, and hereinbefore referred to, were presented to him at the bank on the said 6th day of November, 1902, by Geo. E. Wallace. He said that Wallace asked him to send them off for collection, and when they were collected to credit the amount to his account. That he also asked witness to wire the American National Bank of Dallas, asking whether or not the drafts would be honored; that said Wallace instructed him, the witness, that when said drafts were collected to place the money to his, Wallace's, credit. That the drafts were not collected, but were returned protested, and after they were returned, Mr. Lackland, the cashier of the State National Bank of El Paso, indorsed them back to Patterson & Wallace for the reason that they were given to the bank for collection by that firm, and did not belong to the bank. He further testified that he supposed from Wallace having the papers in his possession that Patterson & Wallace were the owners; that the State National Bank of El Paso was never the owner of said drafts, nor the money to be derived therefrom, but had them only for collection, as an accommodation to Wallace, one of the depositors.

"Witness further testified that he knew nothing of the ownership of the drafts, except what was told him by Mr. Wallace when he presented them.

"J. C. Lackland, a witness, also testified that he was the cashier of the State National Bank of El Paso, Texas, on the 5th day of November, 1902; that he knew Patterson & Wallace, but did not know Ward Mannering. That he did not see the drafts in question until they were returned protested, as they had been presented to the receiving teller; but after they were returned protested, he indorsed them, without recourse, in behalf of the State National Bank, and turned them over to Mr. Geo. E. Wallace. This was a few days after the 6th day of November, 1902. That he did that at the request of Patterson & Wallace, who had placed the drafts in their hands for collection. That the State National Bank of El Paso was never the owner of the drafts, nor had any interest in the money.

"Geo. E. Wallace testified that he resided in El Paso, Texas, and was a member of the firm of Patterson & Wallace, composed of Chas. B. Patterson and himself. That during the month of October, 1902, the firm of Patterson & Wallace, of which he was a member, was employed by Ward Mannering, alias Mason, to defend him in the District Court of El Paso County for four felony charges. Ward Mannering was indebted to the firm for that service in the sum of \$1000. That on the 6th day of November, 1902, Ward Mannering, alias Mason, gave the firm of Patterson & Wallace two drafts, one for \$250 and the other for \$25, drawn on the American National Bank of Dallas, payable to the State National Bank of El Paso, for convenience; that Patterson & Wallace were both present at the time these drafts were



made. That as soon as these drafts were delivered to them, he, Wallace, took them over to the State National Bank and gave them to the receiving teller, Mr. Turner, asking him to send them off for collection, and telling Mr. Turner, when collected, to notify the firm of Patterson & Wallace, or to place the money to his, Wallace's, credit, and he would then call and get it and pay Patterson his half of the amount. He further testified that the day before the drafts were drawn in part payment of the fees of Ward Mannering, they discussed with him, Mannering, the best way of getting the money. That at that time Ward Mannering agreed to make interveners a payment on the fee when due, and stated to them that he had money on deposit in the American National Bank of Dallas, Texas, but that he was unable to say exactly what the amount of such deposit was, but that it was about \$283. That it was then agreed between Ward Mannering and interveners that he give them one draft for \$250 and one for \$25 to cover the amount which he had agreed to pay them at the time on their fee. That interveners told him that if he had less than \$283 or less than \$275 and more than \$250, the bank would pay the \$250 draft and return the \$25 draft, and that the two drafts were drawn in the amounts stated for that reason. That interveners and Ward Mannering also agreed to make the drafts in the name of the bank, for the reason that they could collect them better than if drawn in the name of the firm, Patterson & Wallace. Witness Wallace wrote out the drafts, both he and his partner went down, and Mannering signed the two drafts and gave them to them, and they gave him a receipt for \$275 on the fee then due. Witness took the drafts to the bank, and among other things asked Mr. Turner, the teller, to wire the American National Bank of Dallas, and he (witness) dictated the message. The telegrams referred to by the witness are incorporated in this statement of facts as a part of the written agreement read on the trial of the case.

"The witness stated that the payment of \$275, made by Mannering to the firm of Patterson & Wallace, was on the indebtedness of \$1000 for attorney's fees then owing by said Mannering."

The following are the conclusions of law of the court below upon the above facts:

"The drawing of said drafts was not in the ordinary course of business, but it was attended with such circumstances as to render it clear that it was the intention and agreement of the parties to the transaction that they were to be paid out of the particular fund now in controversy, and the drawing of said drafts and their delivery to interveners under such circumstances, constitute such an assignment to the interveners of so much of said fund as is specified in said drafts as entitled interveners to it, in preference to the plaintiff in garnishment in this suit, and as under the aforesaid written agreement mentioned in paragraph 1 of my findings of fact that is the only issue of law



which I am called upon to decide, judgment will accordingly be rendered in favor of the interveners."

Judgment was rendered by the court in accordance with the above conclusions in favor of the interveners against the garnishee and the appellant, for the sum of \$250 and costs of suit.

There is no doubt that the holder of an unaccepted bank check can not maintain an action thereon against the bank. *House v. Kountze*, 17 Texas Civ. App., 402; *Terry v. Dale*, 27 Texas Civ. App., 1, 65 S. W. Rep., 396. And the simple drawing and delivering a check or draft does not assign the fund against which it is drawn. In this case, however, there was more than merely drawing and delivering a check. The drawer owed the party for whose benefit the checks were drawn the amounts for which they were drawn, and it was agreed by him and them that he would pay to them the aggregate amount of the two checks on his indebtedness to them. He had, prior to the execution and delivery of the checks, informed them that he had funds in the Dallas bank, and desired to pay them out of that fund, and the method of collecting or getting the money out of the bank was discussed, and it was agreed between interveners and the said Mannering that he should issue a check payable to the El Paso bank, so that that bank could collect the amount and pay same over to interveners. Immediately after the first check was issued interveners had the El Paso bank telegraph the Dallas bank to ascertain whether or not Mannering had funds in that bank, and that bank replied that he had deposited with it \$283. Then the said Mannering issued the second check and delivered it to interveners, and they then gave to the said Mannering their receipt for the aggregate amount of the two checks.

The legitimate inference from the testimony in the record is that it was intended by the said Mannering to transfer or assign to interveners \$275 of the fund he had deposited with the Dallas bank. Interveners gave him credit on their account against him for that amount, and he took from them their receipt for the same. And the checks were issued simply for the purpose of enabling interveners to collect said amount, and not in the ordinary course of business.

It fully appears from the record that the El Paso bank did not own or have any interest in these checks, or either of them, and that their connection with the same was simply for the purpose of collecting the amounts called for in them for the interveners. *Clark v. Gillespie*, 70 Texas, 516; *Ralston v. Hope*, 18 Texas, 452; *Gamer v. Thomson*, 35 Texas Civ. App., —, 9 Texas Ct. Rep., 595; *Harris County v. Campbell*, 68 Texas, 22; *Milmo Nat. Bank v. Convery*, 8 Texas Civ. App., 181; *Fourth St. Bank v. Yardley*, 165 U. S., 634; *First Nat. Bank v. Clark*, 134 N. Y., 368; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y., 83; *Risley v. Phoenix Bank*, 83 N. Y., 318.

The court did not err in admitting in evidence the testimony of the intervener Wallace and the two bank officers complained of in appellant's fifth assignment of error. See authorities above cited.



The appellant in this case took no greater rights in the fund deposited in the Dallas bank, by its writ of garnishment and service thereof, than Mannering possessed at the time of such service. He having previously assigned the amount of \$275 of said fund to the interveners, that amount then was the property of and owned by the interveners, and was not subject to the writ of garnishment. .

We are of the opinion that the testimony as shown by the record sustains the judgment of the court below, and it is therefore affirmed.

*Affirmed.*

Writ of error refused June 23, 1904.



## DENISON &amp; SHERMAN RAILWAY COMPANY v. J. B. POWELL.

Decided April 13, 1904.

**1.—Frightening Horse—Signals Increasing Fright.**

Pleading and evidence held to present and warrant submission of issue as to defendant's negligence in increasing the fright of a horse by sounding the bell or gong of a suburban car after perceiving that such sound was having such effect.

**2.—Discovered Peril—Master and Servant.**

If either the conductor or motorman on an electric car perceived the fright of a horse by the sounding of the gong, it was his duty to have it stopped, though he was not the one sounding it.

**3.—Negligence—Speed—Ordinance.**

An ordinance limiting the speed of street cars within city limits makes a higher rate of speed negligence if injury results therefrom.

**4.—Discovered Peril—Pleading—Evidence.**

Submission of the issue of negligence on the part of those operating an electric car in maintaining too high speed after discovery that a horse was alarmed thereby, held warranted by pleading and evidence.

**5.—Personal Injury—Evidence—Hired Help.**

In corroboration of the claim of an injured woman to be disqualified for household work, evidence was admissible that they kept hired help as long as they were able after the injury, and that after that she was assisted in household work by her husband and children.

**6.—Evidence—Leading Question.**

Question to a medical expert as to apparent time the injuries testified to by him had continued held not inadmissible because leading and suggestive.

**7.—Evidence.**

Testimony of a medical witness as to having been called in various cases by other doctors held admissible in view of a cross-examination intimating conspiracy between him and the other attending physician who had called him into the case to make out a case of damages for plaintiff.

**8.—Evidence—Electric Cars in Street.**

Evidence that the street where injury occurred was much traveled by the public was admissible as bearing on the extent of care due from those operating an electric car along it.

Appeal from the District Court of Grayson. Tried below before Hon. J. M. Pearson.

*Head & Dillard*, for appellant.

*E. J. Smith and Wilkins, Vinson & Moore*, for appellee.

**EIDSON, ASSOCIATE JUSTICE.**—This action was brought by the appellee to recover \$25,000 damages, alleged to have been sustained on account of injuries received by his wife through the negligence of appellant. On October 7, 1902, appellee's wife was driving south on Myrick Avenue, in the city of Denison, in a one-horse wagon with her two children, when her horse became frightened at one of appellant's cars, which was coming in a direction meeting her, and finally ran the vehicle against a post or tree and threw her from the wagon, whereby she sustained the injuries alleged in appellee's petition. On November 7, 1902, appellee instituted this suit.

The allegations of negligence were substantially as follows: That



appellant's car was negligently run at a high rate of speed, that is, about twenty miles per hour, and in violation of an ordinance of the city of Denison which limited the speed to the rate of twelve miles an hour; that appellant, its agents, servants and employes, had negligently placed or permitted to be placed and to remain on said car on its side and front streamers or banners advertising or calling attention to some form of entertainment at one of the pleasure parks situated along the line of appellant's railway, between the cities of Sherman and Denison; that the approach of said car at the high rate of speed it was running, and the appearance of said car and said streamers or banners fluttering in the breeze and coming in the direction of the horse and vehicle, so driven by plaintiff's said wife, said car at the time presenting an unusual and unnatural appearance, caused the said horse so driven by plaintiff's wife to become greatly frightened and unmanageable, and as said car approached said vehicle the appellant's agents and servants in charge of said car negligently and recklessly made and emitted loud noises with a bell, gong or whistle, which added to the fright of said horse, already caused by the approach and appearance of said car having thereon said streamers or banners, and increased the danger to appellee's wife and children; that said horse being so frightened and unmanageable, ran the vehicle in which plaintiff's wife and children were driving on and against a tree or post on or about the east side of said street and the track of said railway, and thereby threw plaintiff's wife out of said vehicle and violently to the ground, by reason of which she sustained serious and permanent injuries.

Appellant pleaded general and special demurrers, general denial, and special answer setting up contributory negligence and assumed risk. Appellee by supplemental petition responded to appellant's answer by general demurrer and general denial.

The record shows no action taken by the court below on the demurrers of either party, hence they will be considered as waived. The trial was had before a jury and resulted in a verdict and judgment in favor of the appellee for \$4000.

Appellant's first assignment of error is as follows: "The court erred in the fourth paragraph of the general charge in submitting to the jury the issue as to whether or not defendant's employes in charge of the car saw that the ringing of the bell or sounding of the gong was the occasion of fright on the part of plaintiff's wife's horse and continued to ring said bell or sound said gong after such discovery; the evidence not being sufficient to authorize the submission of such issue."

We overrule this assignment of error, as the record shows sufficient testimony to authorize the submission of the issue to the jury complained of. The appellant under the above assignment of error submits the proposition that the appellee's pleading was not sufficient to authorize the submission of said issue to the jury. We think this proposition is not authorized by the assignment of error; but even if it is properly submitted under that assignment of error, we think the



court below committed no error in submitting the issue complained of to the jury, because the pleadings of appellee were sufficient to authorize such submission.

The following allegations in appellee's petition authorized the submission of the issue complained of: "That the approach of said car at the high rate of speed it was running, and the appearance of said car and said streamers or banners fluttering in the breeze and coming in the direction of the horse and vehicle so driven by plaintiff's said wife, said car at the time presenting an unusual and unnatural appearance, caused the said horse so driven by plaintiff's wife to become greatly frightened and unmanageable; and as said car approached said horse and vehicle, the defendant's agents and servants in charge of said car negligently and recklessly made and emitted loud noises with the bell, gong or whistle, which added to the fright of said horse, already caused by the approach and appearance of said car, having thereon said streamers and banners. \* \* \* That defendant's railway going north was up grade to a point opposite or about opposite the residence of said T. V. Munson, and from there down to the point where plaintiff's wife was injured and to the point where said horse first became frightened, was down grade first and then up grade to said point; and plaintiff's wife was in plain view of the motorman in charge of said car as soon as the same started on said down grade and said motorman saw her; that it was his duty to keep a lookout, and that if he had kept a lookout and exercised ordinary care he would have seen her; but said motorman and defendant's other agents and servants in charge of and upon said car, negligently failed to make any effort to prevent plaintiff's said wife from being injured, and negligently failed to keep a proper lookout, which if done, they would have seen said plaintiff's wife, and by ordinary care and diligence could have stopped the car in time to have prevented injury to plaintiff's wife."

Appellant's second assignment of error complains of the general charge of the court in instructing the jury that the defendant would be liable if the gong or bell was sounded, after either the conductor or motorman discovered that plaintiff's wife's horse was being frightened thereby, without regard to whether or not the gong or bell was so sounded by the one who made the discovery. If either the motorman or conductor saw that the sounding of the gong was frightening the horse of appellee's wife, and would likely cause her injury, if the gong was continued to be sounded, it was the duty of either or both of them to stop or have stopped the sounding of the gong.

It appears from the testimony that both the conductor and motorman saw appellee's wife and the vehicle and the horse some time before the accident occurred, and it also appears from the testimony that the horse got frightened at the car as soon as the same came within sight of appellee's wife, and that his fright increased and he became more unmanageable up to the time of the accident, and that the bell was ringing when



appellee's wife first saw the car, and that it continued to ring up to and after the time of the accident. And it further appears that appellee's wife and the horse were in full view of both the motorman and conductor for a considerable distance before the accident occurred.

We think the evidence reasonably shows that if both the conductor and motorman did not discover that appellee's wife's horse was being frightened, and that the bell was rung after such discovery, it does show that one of them did, which would be sufficient. If the motorman discovered such to be the fact, and he was not the one who sounded the bell after such discovery, it was his duty to notify the employe who was sounding the bell to desist therefrom; and the same would have been the duty of the conductor, in the event he discovered that plaintiff's wife's horse was being frightened by the ringing of the bell. We conclude that there was no error in giving the instruction complained of.

The third assignment of error complains of the general charge of the court in submitting to the jury the issue as to whether or not the plaintiff's wife's horse was frightened by the car being run at a greater rate of speed than twelve miles per hour. An ordinance of the city of Denison in force at the time of the accident, limiting the speed of street cars within the limits of the city to twelve miles per hour, was introduced in evidence; and there is testimony in the record tending to show that at the time of the accident the car was being run at the rate of about twenty miles per hour. Hence there was no error in submitting the paragraph of the charge complained of.

In appellant's fourth assignment of error complaint is made of the fifth paragraph of the general charge of the court in submitting to the jury the issue as to whether or not appellant's employes in charge of the car saw and knew that the rapid speed at which the defendant's car was being propelled was the cause of the plaintiff's horse becoming frightened, and after they saw this, failed to exercise ordinary care to stop said car or slacken its speed.

Appellant insists that the error in this charge consists of (1) in that the evidence was not sufficient to authorize the submission of such an issue; (2) the wording of this charge was upon the weight of the evidence, in that it was calculated to and did cause the jury to believe that defendant's employes actually discovered that plaintiff's horse was being frightened by the running of the car at a speed exceeding twelve miles per hour, and after such discovery failed to exercise proper care to avoid the injury; and (3) appellee's pleading was not sufficient to authorize the submission of the issue.

The record discloses sufficient evidence to authorize the submission of the issue. In regard to the second specified ground of complaint against said charge, appellant having submitted no proposition in relation to said ground, we are not required to consider same; but, even if the matter was properly presented for consideration, we do not think the point is well taken, as in our opinion said paragraph of the charge is not upon the weight of the evidence.



In reference to the question that appellee's pleading was not sufficient to authorize the submission of such issue, we are of opinion that that part of appellee's petition which is as follows was sufficient for that purpose: "That defendant's railway going north was up grade to a point opposite or about opposite the residence of said T. V. Munson, and from there down to the point where plaintiff's wife was injured, and to the point where said horse first became frightened was down grade first and then up grade to said point, and plaintiff's wife was in plain view of the motorman in charge of said car as soon as the same started on said down grade and said motorman saw her; that it was his duty to keep a lookout, and that if he had kept such lookout and exercised ordinary care, he would have seen her, but such motorman and defendant's other agents and servants in charge of and upon said car negligently failed to make any effort to prevent plaintiff's said wife from being injured, and negligently failed to keep a proper lookout, which if done, they would have seen the plaintiff's wife, and by ordinary care and diligence could have stopped the car in time to have prevented the injury to plaintiff's wife. \* \* \* That the approach of said car at the high rate of speed it was running, and the appearance of said car and said streamers or banners fluttering in the breeze, and coming in the direction of the horse and vehicle so driven by plaintiff's said wife, said car at the time presenting an unusual and unnatural appearance, caused said horse so driven by plaintiff's wife to become greatly frightened and unmanageable. \* \* \* That under the circumstances and conditions that then and there existed, it was impossible for plaintiff's wife to avoid the injury that she received; that the place where it occurred was a place of danger to the traveling public, and especially to plaintiff's wife and his said children, and a place where such accidents might reasonably be expected to occur were not proper lookouts kept and proper speed maintained and ordinary care exercised on the part of defendant, its agents and servants, as was well known to the defendant, its agents and servants in charge of said car, and required of them the greatest care and diligence to avoid injuring persons traveling along said Myrick Avenue at the place where plaintiff's wife was injured. Yet plaintiff charges that defendant's agents and servants in charge of said car ran the same at a high rate of speed from said point opposite said T. V. Munson's residence to the place where said horse started to and did run away, without exercising any care or diligence at all, and without considering or caring whether plaintiff's said wife and children and other persons that might then and there be traveling along said avenue, were injured or not."

We overrule the fifth and sixth assignments of error of appellant. As has already been said, there was sufficient testimony introduced to authorize the court to submit to the jury the issues of negligence alleged in appellee's petition, and the matters raised by these assignments of error were questions for the jury, and were properly submitted to them



in the general charge of the court. *McCann v. Con. Trac. Co.*, 38 Law. Rep. Ann., 236; *Topeka Water Co. v. Whiting*, 39 Law. Rep. Ann., 90.

The issues to which special charges numbers 2 and 3 requested by appellant related were properly submitted by the court to the jury, there being sufficient evidence to authorize such submission; and therefore there was no error in refusing to give such specially requested charges.

There was no error in the action of the court overruling the objections of appellant to the admission of the testimony of Mrs. Powell to the effect that appellee kept hired help to do the household work as long as he was able, and afterwards that her husband and children did the most of it after she received her injuries. This testimony tended to corroborate her other testimony showing that she was unable to do her household work, and was therefore material and relevant. However, there was other testimony in substance to the same effect admitted on the trial, to which there was no objection raised. Jane Hudson, a witness for appellee, testified, in substance, that before Mrs. Powell got hurt she was well and hearty and did her own work. Since that time she had not seen her do her own work; that witness, since Mrs. Powell was hurt, had done some work for her, such as washing, ironing and cleaning up, and her children and her husband do her work now. And further, appellant does not complain in its brief that the verdict is excessive, and the admission of the evidence complained of is without prejudice to it.

The appellant complains of the action of the court in permitting, over its objections, the appellee to ask the witness Dr. W. T. Booth the following question: "Then in your judgment, if I understand you, on examination on the second day you were there, you and Dr. Teas found no evidence that the condition you found existing there then existed prior to the time she was hurt?" And in admitting in evidence the answer of said witness to said question, which is as follows: "No, sir; there was no evidence of any prior trouble, in my judgment."

The ground of objection was that the question was leading and suggestive. This witness had, before the question complained of was asked him, testified without objection that plaintiff's wife's injuries were recent. Hence the permission of the question and the admission of the answer thereto could not have prejudiced appellant. And besides there is nothing in the brief of appellant showing that it claimed that appellee's wife was injured prior to the accident upon which this action is based, or that she was not injured upon the occasion of said accident; and appellant does not complain that the verdict is excessive. Hence we do not see how the admission of such testimony could have been to the prejudice of appellant. And further we do not think that the question is leading, as it simply appears to be only a repetition of what was the effect or substance of the testimony of said witness already introduced without objection.

From appellant's bill of exceptions number 6 it appears that the court below permitted the witness Dr. F. M. Teas to testify for plaintiff



that when he was called on by Dr. Booth to wait on Mrs. Powell, that it was not the first time that he had been called on by physicians of Denison, but that other physicians besides Dr. Booth had called on him, although he did not know how many times. It appears from the record that appellant on cross-examination of Drs. Booth and Teas attempted to draw out from them testimony tending to show that Dr. Booth and Dr. Teas had entered into a conspiracy to testify to matters that would support the claim of appellee in this case against appellant. In view of this, we think the testimony objected to was pertinent and material.

Appellant's tenth assignment of error complains of the action of the court in, permitting over its objections the appellee to testify in his own behalf that Myrick Avenue, where the injury occurred, was much traveled by the public. We think there was no error in the admission of this testimony, as it was proper and legitimate for appellee to show that the street where the accident occurred was much frequented and traveled by the public, as tending to show the degree of care required of appellant in operating its cars along said street, and the reasonable necessity for keeping a proper, careful and constant lookout to avoid injuries to persons traveling along said street.

There was no error in the action of the court refusing to permit appellant's witness Miss Mabel Reiley to answer the question propounded to her by appellant, as follows: "Had you seen the horse coming towards you before it got frightened?" If this question was not leading the action of the court was without prejudice to appellant, because the record shows that the witness, in effect, testified that she saw the horse coming towards her before it became frightened, which was the answer sought by the above question.

The twelfth, thirteenth and fourteenth assignments of error simply raise the question as to the sufficiency of the evidence to support the verdict of the jury. We are of the opinion that there is ample testimony in the record to sustain the verdict of the jury.

There being no reversible error in the record, the judgment of the court below is affirmed.

*Affirmed.*

Writ of error refused October 13, 1904.



## L. GOETHAL V. W. M. REED.

Decided April 13, 1904.

**1.—Public Land—Application to Purchase—Name—Identity.**

The application of plaintiff "W. M. Read" to purchase public school land was not invalidated by the fact that it was made under the name "Wm. Reed," where the evidence identified plaintiff as the applicant.

**2.—School Land—Purchase for a Home—Affidavit.**

An affidavit for purchase of school land for a home was not invalid because it omitted the word "land," where other parts of the application identified the section in question as the home desired.

**3.—Evidence—Intention of Purchaser.**

On the issue of a purchaser's intention in good faith to buy school land for a home, the purchaser may himself testify to such intention and to the absence of collusion with others.

**4.—School Land—Purchase for Home.**

An application to purchase together several sections of school land, with affidavit that applicant is an actual settler thereon, but without designating, except by a memorandum in pencil on the application, "settlement is on number 4," gives the applicant no right, being insufficient to show which was purchased as the home and which as additional sections.

ON REHEARING.

**5.—School Land—Application to Purchase.**

An application to purchase more sections of agricultural land than the applicant was entitled to buy gave no right to him as against a subsequent applicant, and it rested upon him to show that an amendment striking out one of the sections and reducing the amount to such as he was entitled to purchase was made before the application of such subsequent purchaser to buy.

Appeal from the District Court of Concho. Tried below before Hon. John W. Goodwin.

*J. W. Hill, G. H. Garland, and John I. Guion, for appellant.*

*Jenkins & McCartney, for appellee.*

FISHER, CHIEF JUSTICE.—This is a suit by appellee in trespass to try title to recover section 6, located by virtue of certificates issued to the Southern Pacific Railway Company, situated in Concho County. Defendants Loomis and Wilson disclaimed.

The appellant Goethal filed an answer containing general and special demurrers, general denial and plea of not guilty, and a cross-action to recover section 6 in district 11, in the name of the Southern Pacific Railway Company, containing 640 acres, situated in Concho County. Verdict and judgment were in favor of the appellee for the land in controversy.

We find the following facts: On August 23, 1897, section 6, the survey in controversy, was school land, situated in Concho County and was classified as dry agricultural land, valued at \$1.50 per acre, and was then on the market for sale under that classification. Sections 2, 4 and 8 in district 11, Southern Pacific Railway Company, were school lands located in Concho County, and were at this time classified as dry



agricultural lands, valued at \$1.50 per acre, which surveys were also properly on the market for sale. On the 23d day of August, 1897, the plaintiff made his application in due form, as required by law, to purchase section No. 6 in controversy, which application describes the land as section 6, block 11, Southern Pacific Railway Company, 640 acres, price per acre, \$1.50, and is stated in the application as classified as dry agricultural land. The application states that the applicant Wm. Read, who the evidence shows to be the plaintiff in this cause, desires to purchase the land for a home, and that he has in good faith settled thereon, and was at that time a bona fide settler thereon, and that he was not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in his purchase. His application was sworn to, as required by law; and the evidence shows that he executed the obligations and made the payments, as required by law. On the back of the application appears an indorsement to the effect that this is the application of William Read to purchase section 6, granted to the Southern Pacific Railway Company in Concho County, and was received in the land office August 26, 1897, with the word "Rejected" indorsed thereon. Plaintiff also introduces certificates of first payment to the Treasurer of the State, as required by law.

Plaintiff, for the purpose of showing why his application was rejected, introduced in evidence the application of the appellant, made on August 23, 1897, and filed in the Land Office August 24th, and awarded to appellant October 21, 1897, which application is as follows:

"Application and Affidavit to Purchase as an Actual Settler: Austin, Texas, Aug. 23, 1897.—Hon. Andrew J. Baker, Commissioner of the General Land Office: I hereby apply to purchase under the provisions of 'An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools and the several asylums, and the lease of such lands, and of the public lands of the State, and the patenting of any part of the said lands for church, cemetery or schoolhouse sites, and to prevent the free use, occupancy, unlawful inclosure or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor; as provided for in title 87, chapter 12a of the Revised Civil Statutes of 1895, and the amendments thereto, by the Act of May 19, 1897, the following land situated in Concho County, Texas, and about eight miles (give course) S. W. from county site, agreeing to pay for the same the price per acre below specified:

Section	Township	Block	Certificate	Guarantee	Acres	Price per acre	Classification
4	.....	11	.....	S. P. R. R. Co.	640	\$1.50	Agricultural.
6	.....	11	.....	S. P. R. R. Co.	640	\$1.50	Agricultural.
2	.....	11	.....	S. P. R. R. Co.	640	\$1.50	Agricultural.



"Settlement is on No. 4 [this in pencil].

"For the purpose of securing the said land, and of complying with the law regulating the same, I hereby make and subscribe to the following oath, to wit: I, Louis Goethal, do solemnly swear that I desire to purchase said land for a home, and that I have in good faith settled thereon, and am now a bona fide settler thereon. I further swear that I am not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in this purchase save myself; that I am over eighteen years of age; that my postoffice address is Paint Rock, in Concho County, State of Texas.

(Signed)

"LOUIS GOETHAL, Applicant.

"Subscribed and sworn to before me, this 24th day of August, 1897.

[Seal]

"R. M. ARMSTRONG,

"Notary Public, Travis County, Texas."

Plaintiff also introduced in evidence the obligation executed by the defendant.

There is evidence in the record which shows that the appellee, the plaintiff below, was an actual settler on the land at the time that he applied to purchase the same, and that the facts stated in his application were true.

Appellant's first assignment of error complains of the action of the court in admitting in evidence the application of the plaintiff to purchase the land, because the suit was brought by W. M. Read, and the application was in the name of Wm. Reed. The evidence in the record identifies the plaintiff in this case as the same party who applied to purchase the land in controversy. He brought his suit in the name of W. M. Read, but we are of the opinion that Reed and Read are idem sonans.

The third assignment of error complains of the action of the court in admitting the plaintiff's application to purchase, because the affidavit accompanying the same does not show that the applicant desires to purchase the land for a home. It does in one place omit the word "land," but from the other parts of the application it clearly appears that the plaintiff desires to purchase the survey in controversy, which necessarily embraces the idea that it was land. He expressly stated that he desired it for a home.

We are of the opinion that the evidence that the court admitted over the objection of appellant, as complained of in the fourth, fifth and sixth assignments of error, was admissible. It was proper for the plaintiff to state that he desired to purchase the land in controversy as a home for himself, and whether his intention at the time of the application was in good faith to acquire it as a home, and whether or not he was acting in collusion with any other person or corporation in the purchase of the land. These were facts peculiarly within his knowl-



edge, and it was proper for the court to permit him to testify thereto.

Our findings of fact dispose of appellant's tenth assignment of error. We are of the opinion that there is enough evidence in the record bearing on the question of settlement to show that the plaintiff was an actual settler on the land at the time that he applied to purchase the same.

Appellant's seventh and eighth assignments of error complain of the action of the court in refusing to admit in evidence his application, affidavit and obligation to purchase the land in controversy. Appellant's application has been set out in our findings of fact. In the appellant's application there are four sections applied for, Nos. 4, 6, 2 and 8. No. 8 seems to be erased, but when this occurred the testimony does not show. But if we consider that it was properly erased, it leaves the application calling for three sections of agricultural land, which the appellant states he desires to purchase. There is written below this description the words, "Settlement is on No. 4." Whether that means that he was an actual settler on section 4, the application leaves in doubt, as the mere expression "settlement" is not sufficient to indicate that that was his home section, and that he then at the time of the application was actually residing upon that section. *Mahoney v. Tubbs*, 8 Texas Ct. Rep., 887. The application states that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he was at the time that the application was made a bona fide settler thereon. He could not purchase under the law all four or three agricultural sections as a home, and it was physically impossible for him to be a bona fide settler on all of the sections. The law at the time that the application was made did not allow a purchaser to acquire more than two agricultural sections. The application states that the applicant desires to purchase three or four agricultural sections, and it is impossible to determine from the face of the application which one of the surveys he was at the time of the application a bona fide settler on, using the same as a home.

It was not contemplated by the law that the application should embrace more sections of the class of land than the applicant was entitled to purchase, and that he could thereafter make a selection of the number allowed by law. Such a course, if recognized, would have the effect of taking more land off the market from the date of the application than the applicant was entitled to purchase, and thereby prevent other applicants, who might desire to purchase the same class of land, from applying therefor.

We find no error in the ruling of the court in refusing to admit in evidence the appellant's application. A proper application was the basis of his title, and if that was properly excluded it follows that no error was committed in refusing to permit him to offer evidence of his obligation and evidence of payment and settlement.

We find no error in the record and the judgment is affirmed.

*Affirmed.*



## OPINION ON REHEARING.

FISHER, CHIEF JUSTICE.—In the original opinion we stated that section 2, with the other lands in appellant's application to purchase, was classified as dry agricultural land. In making this statement we were misled by the description and classification given in his application to purchase. All of the four sections there described were in the application classified as dry agricultural lands.

Appellant in his motion for rehearing and in his request for additional findings of fact states that such classification, as relates to section 2, was a mistake, and we are inclined to the view that this was the case. It appears from the evidence that at the time that the appellant and the appellee both filed their applications to purchase on August 23, 1897, section 2 was classified as dry grazing land, and appraised at \$1 per acre. The other three surveys—that is, 4, 6 and 8—were classified as dry agricultural lands, as stated in our original opinion. Therefore our findings of fact will be corrected as above suggested.

We also find from evidence stated in the record, which is incorporated in one of appellant's bills of exception, and which evidence the appellant in his motion for rehearing requests that we consider, that the application made by the appellant was prepared by his attorney under a suggestion from the Commissioner of the Land Office that all four sections could be embraced in one application, and that it was only necessary to designate upon the application which of the four sections was the home section; and that in accordance with this suggestion the appellant, through his attorney, indorsed on the application the words: "Settlement is on No. 4."

We also find from the evidence as stated in appellant's bill of exception as heretofore referred to, that at the time that appellant's application was filed in the Land Office for sections 4, 6, 2 and 8, there was no erasure or marking out of the last named section; and the evidence in the record does not definitely show when this erasure was made in appellant's application, but upon the back of this application appears an indorsement to the effect that sections 4, 6, 2 and 8 were applied for; and is the further indorsement that the application was received in the Land Office August 24, 1897, and awarded October 21, 1897. This indorsement is signed by the Commissioner of the Land Office.

On September 30, 1897, the appellant by a separate application applied again to purchase section 8, which was then classified as dry grazing lands; and that this survey was awarded to him on October 21, 1897, the same day that the award was made of sections 4, 6 and 2. This last application states that it is an amendment to the application previously made by the appellant, that is the application of date August 23, 1897. The date of the making of this last application, which was September 30th, seems to be the time in which the original application was amended, and we take this to mean, where there is no other evidence to the contrary, that the change or erasure made in the original appli-



cation by drawing a line through section 8 was made on the day that this last application was filed. At the time of the original application, all of the four sections as applied for by appellant were classified as dry agricultural lands except section 2, and such was the classification at the time that appellant's original application was filed in the General Land Office, and at the time that the appellee applied to purchase and filed his application for section 6, the survey in controversy.

Thus it is seen that if we eliminate section 2, or in other words, regard it as classified as dry grazing land, the application of the appellant as actually filed in the Land Office embraces three surveys of agricultural land which he applied to purchase, when the law then existing did not authorize a purchase of more than two agricultural sections.

We may admit the rule to be that the burden rests upon the one asserting under the subsequent application to establish the facts that show the superiority of his right; or, in other words, that the prior applicant acquired no right; but in this case we are of the opinion that the appellee has discharged this burden, for the reason that when the appellant filed an application in the Land Office to purchase three agricultural surveys, and the application was in that condition when actually received and filed by the Commissioner, its invalidity is apparent, and the one desiring to subsequently purchase could act upon the condition of the application as there found to be filed, and if then discovered to be invalid, his superior right would be established. The original application being invalid when filed in the Land Office the burden rested upon the appellant to show the facts and circumstances that would relieve it of its invalidity prior to the time that the appellee applied to purchase.

No attempt was made by the appellant to show that the erasure of section 8 occurred or was made under his authority prior to the time that the appellee filed his application in the Land Office; but as said before, on the contrary, it reasonably appears that such change was not made until the purported amended application was filed by the appellant on the 30th of September, which was a time subsequent to the making and filing in the Land Office of the appellee's application.

We reiterate the doctrine announced in the original opinion to the effect that it is not the policy of the law to recognize the validity of an application which embraces more sections of agricultural land than the applicant would be entitled to purchase. Such an application, if recognized, would have the effect of taking such land off the market, and thereby suspend the right of other qualified purchasers to acquire any part of such lands to such a time as the original applicant should see fit to correct or erase from his original application some of the surveys classed as agricultural, and thereby reduce it to the number which he is authorized under the law to purchase.

The motion for rehearing is overruled, and the request for additional findings of fact is complied with to the extent stated in this opinion.

*Overruled.*

Writ of error refused October 13, 1904.



GULF, COLORADO & SANTA FE RAILWAY COMPANY v.  
F. J. ELDREDGE ET AL.

Decided April 13, 1904.

**1.—Assignment of Cause of Action—Settlement—Notice.**

The assignee of an interest in a cause of action against one who subsequently settled with the assignor without the assignee's knowledge, not having filed his assignment with the papers in the suit in accordance with Revised Statutes, article 4647, must show that the defendant had notice of his rights before making settlement, to entitle him to recover of such defendant his interest as assignee in the amount for which the claim was settled.

**2.—Same—Statute.**

Articles 308, 309, Revised Statutes, though applying by their terms only to assignment of written instruments, may be looked to in determining the question of burden of proof as to notice of an assignment of a claim not based on a writing.

**3.—Assignment—Compromise.**

The assignee of an interest in the amount to be recovered by suit or settlement on a nonnegotiable cause of action may recover his proportionate interest in the amount paid his assignor in settlement by a defendant who had notice of his interest therein, without establishing the legal liability of such defendant to his assignor.

**4.—Same—Jurisdiction.**

The court in which a suit for damages was pending when defendant settled with plaintiff therefor had jurisdiction, on intervention of assignees of an interest in the amount so recovered, to determine the right of such assignees to recover from defendant their proportionate interest in the amount so paid in settlement.

Appeal from the District Court of Bell. Tried below before Hon. John M. Furman.

*J. W. Terry and A. H. Culwell*, for appellant.

*W. W. Hair*, for appellees.

FISHER, CHIEF JUSTICE.—On the 10th day of January, 1902, Eldredge, by his attorneys, W. C. Halbert and J. W. Parker, filed suit in the District Court of Bell County against the appellant for damages on account of injuries sustained by Eldredge when performing the services of brakeman in the employ of appellant, on January 5, 1902.

One June 2, 1902, the appellant by its answer pleaded a settlement with the plaintiff Eldredge, executed on February 6, 1902, and asked that the case be dismissed. Thereafter W. C. Halbert and J. W. Parker intervened and pleaded a contract executed by Eldredge on the 9th day of January, 1902, whereby there was assigned to Halbert and Parker 45 per cent of the amount that might be recovered by judgment or compromise.

On June 1, 1902, the defendant filed an answer to this plea of intervention, claiming that the court was without jurisdiction, and repeated its request for a dismissal of the case, which plea was overruled.

On the trial of the case the court entered judgment in favor of Hal-



bert and Parker for the sum of \$180, which was 45 per cent of the amount paid by appellant to Eldredge in the settlement of the case with him.

It appears from the facts that the suit instituted by Halbert and Parker for Eldredge was filed on the 10th day of January, 1902. On the 9th day of January, the day preceding the filing of suit, they entered into a written contract with Eldredge, whereby it was, in effect, agreed that Halbert and Parker should, for their services as attorneys, receive 45 per cent of the amount that might be recovered, either by judgment or compromise from the appellant. On February 6, 1902, the appellant settled with Eldredge in full for the sum of \$400, which settlement was without the knowledge and consent of Halbert and Parker. It does not appear from the statement of facts whether the appellant did or did not have notice at the time that it settled with Eldredge of the contract of the latter with Halbert and Parker. The contract was not filed and recorded, as provided for in article 4647 of the Revised Statutes. All that appears upon this subject is an indorsement signed by the district clerk of Bell County, to the effect that the contract was filed, but whether it was on file with the papers of the case at the time that the settlement was made by the appellant with Eldredge, does not appear.

The contract with Halbert and Parker being executed before the suit was filed, is governed by article 3353a of the Revised Statutes of 1895, which is held to apply to contracts of this character, as is shown by the case of *Gulf C. & S. F. Ry. Co. v. Miller*, 53 S. W. Rep., 709, and which was approved in the later case of *Texas Central Ry. Co. v. Andrews*, 67 S. W. Rep., 924; and in which last case a writ of error was refused, and was expressly approved by the Supreme Court in *Galveston H. & S. A. Ry. Co. v. Ginther*, 96 Texas, 299. Under this provision of the statute, an interest in the cause of action held by Eldredge against the Gulf, Colorado & Santa Fe Railway Company was assignable; and it was not essential that article 4647 should be complied with in order to charge the railway company with notice of the right and interest of the assignees. But, however, we are of the opinion that the burden of proof was upon the assignees Halbert and Parker to establish the fact that the appellant knew of the interest that they had acquired by virtue of the assignment at the time it made the settlement with Eldredge.

Article 309 of the Revised Statutes provides that the assignee of any instrument mentioned in the preceding article may maintain an action thereon in his own name, but he shall allow every discount and defense against the same which it would have been subject to in the hands of any previous owner before notice of the assignment was given to the defendant. The previous article referred to is article 308, which authorizes a pledgee or assignee of any instrument not negotiable by the law merchant to transfer by assignment his interest to another. It is true that these provisions of the statute use the expression "written



instrument," but we are inclined to the opinion that it can be looked to in order to determine upon whom the burden rests to establish the fact that payment was made with notice or without notice of the assignment.

The statute provides that the assignment is made subject to all of the defenses before notice of the assignment was given to the defendant. The use of the expression "notice of the assignment was given to the defendant," implies that the defendant must be given notice of the assignment in order to preclude him from asserting a settlement made with the original creditor. The rule may possibly be otherwise with reference to negotiable instruments. A debtor who settles with the original creditor a nonnegotiable claim, without notice that it has been transferred, ought to be protected; and we are inclined to the opinion that the burden of proof rests upon the assignee to establish some fact indicating that the debtor had notice at the time the settlement was made with the original creditor. 2 Am. and Eng. Enc. of Law, 2 ed., 1077, 1099. There being no evidence upon this subject, the judgment will be reversed and the cause remanded.

The appellees' cause of action was for 45 per cent of the amount paid by the appellant to Eldredge. The contract upon which they base their cause of action transfers to them this percentage of the amount that might be received in compromise. Such being the case, they would be entitled to recover this amount without establishing the fact that the appellant would be and was liable to Eldredge on a cause of action for damages, as alleged in the petition. The right to recover in a case of this kind for the part of the amount that the assignees were entitled to that was paid to the injured party in settlement is recognized by the case of Galveston H. & S. A. Ry. Co. v. Ginther, *supra*, and cases there cited.

We are also of the opinion that the trial court had jurisdiction to adjudicate the matter in controversy. It having properly assumed jurisdiction over the original case, it had the power to determine all matters of litigation that could be properly presented and passed upon in the original suit. Halbert and Parker being assignees of an interest in the original cause of action, could prosecute the same to judgment; and the court having jurisdiction over the original case could ascertain and determine the interest of Halbert and Parker.

For the error pointed out, the judgment will be reversed and the cause remanded.

*Reversed and remanded.*



WILLIAM H. BESSLING & Co. v. HOUSTON & TEXAS CENTRAL  
RAILWAY COMPANY.

Decided April 13, 1904.

**1.—Contract—All Rail Route—Water Route.**

Written instructions given the agent of a railway by a cotton shipper to send the cotton of such shipper by an all rail route, to which the agent assented but at the same time told the shipper that the railway would disregard such instructions and send the cotton part way by a water route according to their custom, did not constitute a contract binding the company to an all rail shipment, but amounted only to an instruction or direction of the shipper.

**2.—Bills of Lading—Choice of Route.**

Bills of lading specifying no particular route for a certain shipment of cotton, give the carrier the right to choose the route.

**3.—Railway—Agent—Authority—Route.**

The agent of a railway has authority to bind the company as to the routing of a through shipment in the absence of knowledge by the shipper of limitation on his powers; but where he notified a shipper demanding an all rail shipment that the company would not regard such billing by him but would send it partly by water, this was notice to the shipper of his lack of authority to contract for an all rail shipment.

**4.—Carrier—Act of God—Deviation.**

Where there was no contract by the carrier for all rail transportation and the bill of lading was silent as to the route, the selection of a route partly by water, whereon the goods were lost by act of God, did not make the carrier liable.

Appeal from the District Court of Limestone. Tried below before Hon. L. B. Cobb.

*Etheridge & Baker*, for appellants.

*Williams & Bradley, Andrews & Ball*, and *H. L. Borden*, for appellee.

JAMES, CHIEF JUSTICE.—Plaintiff alleged that he was a buyer and shipper of cotton at Mexia, that in August, 1900, he gave defendant's agent at that place written notice to ship all of his cotton for and during the years 1900 and 1901 from Mexia to Galveston all rail, and not to divert any of it at Houston and not to transport or have same transported from Houston to Galveston by water. That defendant, through its said agent, assented to said written request, which plaintiff alleges constituted a written contract between plaintiff and defendant to that effect. That on September 4th he delivered to defendant for transportation from Mexia to Galveston 100 bales of cotton, which were received under said general contract, upon which plaintiff relied. That after the delivery and acceptance of the cotton defendant executed and delivered to plaintiff two bills of lading dated September 4, 1900, covering said cotton; that he, relying on said general contract, and that these bills of lading were in accordance therewith, did not inspect them, said bills being in fact silent as to the method of shipment; that the shipment was made in pursuance and by virtue of the said previously existing contract; that the bills of lading are wholly without consider-



ation, in that they were neither executed nor delivered until after the cotton had been tendered and accepted for transportation by an all-rail route to Galveston under said existing contract, and they should be reformed so as to conform to the intention of the parties, and that the bills of lading were so written through the fraud, mistake or inadvertence of said agent, etc. That defendant violated said express agreement by diverting the cotton and forwarding it from Houston to Galveston by a craft plying on Buffalo Bayou which was wrecked (in the storm of September 8, 1900,) and certain of the cotton lost and the remainder damaged, for which he asks damages.

No question arising on the pleadings, we shall state the substance of the judge's conclusions: Plaintiff had for a number of years been shipping cotton by defendant's line to Galveston, and defendant had carried it to Houston, and at the latter place forwarded it to Galveston by the Houston Direct Navigation line, a water route. Plaintiff had during this time given no direction for routing cotton beyond defendant's line and defendant usually forwarded it by the Houston Direct Navigation line. Plaintiff had become dissatisfied with this, and about August 20, 1900, before shipping any cotton that season. delivered to defendant's station agent at Mexia a written order to route all his cotton destined for Galveston by all rail and not by said water route, "which order the agent orally agreed to, at the same time telling plaintiff that while he would bill the cotton as directed, the office in Houston generally took their own route and would pay no attention to him." (We have quoted the language of the findings.) Said agent by virtue of his general authority to represent defendant in its business as a common carrier had authority to accept and agree to said order and bind the defendant thereby. That on September 4th plaintiff delivered the cotton for transportation to Galveston to said agent at Mexia and made out the bills of lading therefor, which did not designate the route or means by which it should go from Houston,—gave no oral or other direction at the time, but relied on said general direction. Defendant delivered the cotton at Houston to the navigation company, and the barge was wrecked on the voyage to Galveston by an unprecedented storm which the court finds was the act of God. The judge's conclusions of law are as follows:

"1. Defendant's agent at Mexia had authority to legally bind the defendant to forward plaintiff's cotton by rail under the contract covering the shipment for the season.

"2. The direction in writing made out, signed and delivered by plaintiff to such agent and orally agreed to by him was a written contract between the parties, notwithstanding the agent at the time expressed his belief that defendant would not abide by the direction.

"3. The bills of lading for shipment of said 100 bales of cotton made out by plaintiff, signed by defendant's agent and accepted by plaintiff, were contracts in writing, and having relation to the particular transaction must be regarded as superseding the general contract



to ship by rail, and such bills not stipulating for the routing of the cotton, the defendant had the right to choose the route as though the bills expressly provided that defendant might select the route.

"4. If the general contract regarding all shipments for the season was not superseded by the particular agreement for shipment of the 100 bales, the defendant is liable for the damage on grounds of deviation in the routing of the cotton although the proximate cause for such damage was the act of God."

*Opinion.*—There is no doubt that the agent at Mexia had power, by virtue of his ostensible authority, to bind the defendant in a contract to forward this cotton from Houston to Galveston by rail. But it is equally free from doubt that if the agent had no authority to do this and the plaintiff had notice of such lack of authority, defendant would not be bound by it as its contract. Plaintiff's own testimony in reference to the letter which he had in person delivered to the agent was, "that all our shipments, without exception, should go from Mexia to Galveston via all rail and not by the Houston Direct Navigation Company." That the agent agreed to it, but at the same time he told plaintiff "that he would bill our cotton, but that the office in Houston generally took their own route and would not pay any attention to him." This, coupled with another fact which was in evidence, viz., that defendant at Houston forwarded the cotton by water route although the Mexia agent noted on the way bills "all rail," shows that the latter was in fact lacking in authority to bind defendant by a routing over a particular route from Houston. Plaintiff had notice of this limitation on the agent's authority from what the latter said to him. Therefore, if the agent undertook, as found by the court, to contract in behalf of defendant for the carriage by rail from Houston and plaintiff under the circumstances treated it as a contract, he did so subject to the event of its being disregarded by defendant.

However this may be, we are unable to hold that the transaction was a contract at all, and particularly not a written contract. The letter which was signed by plaintiff alone, if assented to and acted upon, would have the character of a contract in writing between the parties. But the assent would have to exist and be unqualified. The evidence is that the agent assented, at the same time explaining that defendant was not going to recognize such routing. So far as assenting for the railway company, we think he did not do it, nor undertake to do it. He in effect gave plaintiff to understand that the desired routing would be disregarded by defendant. See *Hinckley v. Ry. Co.*, 56 N. Y., 429. The view we take of the evidence is that the transaction was clearly no contract, but that the utmost effect which is proper to give the letter is to treat it as an instruction or direction of the shipper.

Upon this theory the judgment rendered was correct. The bills of lading evidenced and constituted the contract between the parties. The averments of fraud, mistake, etc., touching the bills of lading were



eliminated by undisputed evidence of the fact that the instruments were prepared by plaintiff himself, and are no longer relied on. The bills are silent as to any particular routing, and their legal effect as written was that defendant could forward the cotton from Houston by an agency of its own selection. It has been held that it is not permissible to vary the terms or legal import of bills of lading by proof of such transaction as the direction in question. *Wells, Fargo & Co. v. Fuller*, 4 Texas Civ. App., 213; *Galveston H. & S. A. Ry. Co. v. Silegman*, 23 S. W. Rep., 298.

Not only do these bills of lading fail to specify any particular means for transporting the cotton from Houston to Galveston, but they contain provisions which seem to contemplate rather than exclude the use of water transportation, which makes the above cases the more applicable. See *Hinckley v. Railway Co.*, 56 N. Y., 429, which is in many respects similar to this case on the facts.

Plaintiffs drew the contracts themselves, omitting therefrom any reference to any particular route from Houston, and in this condition accepted them. There was no fraud or mistake entering into the transaction. They had no other contract with defendant, written or oral, on the subject. They had, it is true, a filed written instruction for their shipments to go by all rail, but they prepared and accepted these contracts which, in their terms, permitted defendant to follow its own preference in the matter.

There are cases which deny the right of a shipper in a shipment of this character to direct over what connecting route the freight shall be carried. See *Post v. Southern Ry. Co.*, 52 S. W. Rep., 301. The authorities are found to be conflicting, however, and the question does not seem to have been directly decided by the Supreme Court of this State. But in the circumstances under which the bills of lading in question were taken, we think the direction or instruction can not be held entitled to any effect in reference to the matter with which these bills of lading deal.

The petition proceeds upon the theory that the letter was a written contract which affected and governed all prospective shipments of cotton by plaintiff that season. As we hold it was not a contract, we need pursue this theory no further. We have had some doubt as to whether plaintiffs could, upon their pleadings, recover on any other theory, having based their case on the same being a contract. But as the petition alleges the facts upon which they seek relief we deem it proper to consider the effect, upon the shipment, of said letter as an instruction or direction.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



HENRY TUCKER BY NEXT FRIEND, v. NATIONAL LOAN AND  
INVESTMENT COMPANY.

Decided April 13, 1904.

**1.—Minor—Experience—Assumed Risk.**

Where a minor has the same experience and knowledge as an adult he is held to assume the ordinary risks which he understands, and a master employing such minor is not required to warn him any more than an adult of dangers which he could ascertain by the ordinarily careful use of such knowledge and experience as he possesses.

**2.—Same—Farm Hand—Assumed Risk.**

An experienced farm hand, though a minor, is held to have assumed risks incident to loading sheaf oats on a wagon frame and riding thereon over a road well known to him, and can not recover for injuries sustained by the oats sliding and causing him to fall.

**3.—Charge—Immaterial Error.**

Where the evidence is sufficient to have justified a peremptory instruction the question of error in charges given become immaterial and will not be considered.

Appeal from the County Court of Johnson. Tried below before Hon. J. D. Goldsmith.

*S. C. Padelford*, for appellant.

*O. T. Plummer and Pruitt & Smith*, for appellee.

FLY, ASSOCIATE JUSTICE.—This is a suit for damages prosecuted by Andrew Tucker, as the father and natural guardian of Henry Tucker, a minor. It was alleged that Henry Tucker was employed as a farm hand on the farm and ranch of appellee, in Johnson County, and that he was a minor and inexperienced in handling and hauling oats; that in June, 1902, appellee ordered Henry Tucker, in connection with another boy, to load certain oats on a wagon and haul them from the field to the barn; that a certain wagon was furnished for the purpose, and in pursuance of the order the oats were loaded upon the wagon and Henry Tucker took his seat on the oats, and while engaged in driving the wagon over a rough place the oats slipped and Henry Tucker was precipitated to the ground, receiving the injuries on account of which the damages were sought. It was alleged that the oats slipped off by reason of the defective condition of the wagon, and that the minor had not been warned of the danger attending the work. Appellee answered by pleas of general denial and contributory negligence on the part of Henry Tucker.

The evidence showed that Henry Tucker was between 19 and 20 years of age, that he was employed by appellee to do general farm work. Henry Tucker had been working on farms for six years at the time he was hurt and was well acquainted with farm work. He had worked a great deal with oats and wheat. He testified: "I know how to load sheaf oats on a wagon; I would risk my judgment on it. I would load them just like any other man that knows how." He knew the road



over which the oats had to be hauled. He, in company with another boy, was ordered to haul about seventy-five bundles of oats from the field to the barn. Henry Tucker placed the oats on the wagon, as he swore, "just like anybody else would; put a tier in the middle." The load was two or three feet above the wagon frame when completed. The oats were not tied on the wagon, because Henry Tucker did not think it was needed. He testified: "I was familiar with the road we had to go over with the oats; had been over it several times. I knew the slippery character of sheaf oats, though I do not think them more slippery than wheat. I knew that if the bundles were not supported they would fall. I knew it would be dangerous to haul them on a baled hay frame if they were loaded too high, but did not think there was any danger in hauling upon the hay frame the quantity we put on at that time." It was shown that a hay frame is not suitable for hauling large quantities of sheaf oats, but it would not be dangerous to haul the quantity of sheaf oats on that kind of frame that was hauled by the boys. Appellee's manager told Henry Tucker and another boy on the morning of the accident to haul the remnant of hay to the barn and then to haul the sheaf oats and potatoes to the barn. After the oats had been placed on the hay frame Henry Tucker got on the oats nearest to the mules and started to drive to the barn, and when they were crossing the railroad and just as the front wheels got over the second rail, the bundles of oats on which Henry was sitting slipped and he fell on the tongue. Only two or three bundles slipped, and Henry stated, "I could have fallen off of that wagon without a single bundle falling off." The boy who accompanied Henry Tucker was the son of appellee's manager. Henry Tucker was experienced in all kinds of farm work. He had been using a rope in hauling hay, to tie it on, and knew where it was. Henry Tucker was flatly contradicted by the other boy as to the manner in which he was hurt, but we have taken the account of the matter given by the former in the consideration of the case.

It is the general rule that a servant is charged with knowledge of the ordinary perils incident to and ordinarily attending his master's service, and will be presumed to have assumed such risks when he enters such service, and it is a conclusion of the law, fixed and peremptory, that he can not recover for an injury which resulted from a risk of that description, unless the evidence fairly tends to show that the injured person, on account of his youth or inexperience, could not be charged with having comprehended the risk attending his employment. The rule in regard to minors proceeds upon the theory that they are usually less capable of understanding the dangers connected with their employment and of avoiding those dangers of which they may be apprised, than the adult. It rests upon the same basis as inexperience in an adult, the difference being that the law will presume, in the absence of proof to the contrary, that the minor did not appreciate and assume the ordinary risks of his employment, unless they are so obvious that anyone must be held to know them, while in the case of the adult, his



knowledge of ordinary risks will be presumed in the absence of testimony showing that, from inexperience or ignorance, he was not chargeable with a knowledge of them. Where it is shown, however, that an injured minor has the experience and the knowledge of an adult he must have applied to his actions the same rules that are applicable to the adult. In other words the minor is held to assume the risks which he understands.

When the master employs a minor he must take notice of the probability that he is not as well qualified to appreciate the risks attending his work and using the proper means of guarding against them as the adult, and this duty rests upon him of warning the minor of the dangers attending the service. The master, however, is not required to instruct and warn a minor of intelligence and experience, any more than an adult, as to the dangers which are readily ascertainable by the ordinarily careful use of such knowledge, experience and judgment as he possesses. *Texas & P. Ry. Co. v. Carlton*, 60 Texas, 397; *Gulf C. & S. F. Ry. Co. v. Jones*, 76 Texas, 351.

The facts in this case, that were presented by the injured party, establish a clear case in favor of appellee. It can not be and is not denied by Henry Tucker that he was an experienced farm hand and especially understood the handling of wheat and oats in the sheaf. This was known to the manager of appellee, and there was no call for any instructions or warning. The minor knew as much about the work as the manager. If there was any danger in loading the oats and sitting on them as he did, he knew it as well as his employer. Anyone with ordinary intelligence, it would seem, should know that bundles of oats laid on a wagon frame would likely be jostled or jarred out of place by driving the wagon over the rails of a railroad track, and such being the case no cause of action was shown. As said in *Crown v. Orr* (N. Y.), 35 N. E. Rep., 648, where a boy 19 years of age was injured: "The servant when he enters into the relation assumes not only all the risks incident to such employment, but all dangers which are obvious and apparent. The law imposes upon him the duty of self-protection, and always assumes that this instinct so deeply rooted in human nature will guard him against all risks and dangers incident to the employment or arising in the course of the business of which he has knowledge, or the means of knowledge. This principle applies to plaintiff, though he was not at the time of full age. Like any other servant he took upon himself the ordinary risks of the service, and all dangers from the use of machinery which were known to him, or obvious to persons of ordinary intelligence. He is bound to take notice of the ordinary operation of familiar laws, and to govern himself accordingly, and if he fails to do so, the risk is his own." Henry Tucker loaded the oats on the wagon and did it, as he said, as any other man would have done. He knew the sheafs were liable to slip. He seated himself on the sheafs and drove along the road and over a railway crossing with which he was well acquainted. The court would have



been justified in instructing a verdict for appellee, and it follows that although errors may have been committed in giving and refusing charges, they become immaterial and need not be considered.

The judgment is affirmed.

*Affirmed.*



## HOUSTON &amp; TEXAS CENTRAL RAILWAY COMPANY v. L. H. BULGER.

Decided April 13, 1904.

**1.—Impeaching Witness—Indictment for Perjury—Evidence.**

Under the rule that in impeaching a witness the examination must be confined to his general reputation and not include particular facts, the court properly sustained objections to a question asked of a witness whether he had ever been indicted for perjury, and the introduction in evidence of an indictment charging him with this offense; no presumption of guilt arose from such indictment.

**2.—Evidence—Pumping Station—Keeper—Authority.**

Excluded evidence offered to prove that a keeper of defendant's pumping station had received instructions before, and at another place than the one where the accident happened, not to allow people on the premises, held immaterial where the testimony showed that he had no authority to invite people on the premises.

**3.—Possession of Property—Right to Keep Out Intruders.**

When one places his property in the exclusive control of another the right to protect the possession from intruders and prevent any interference with the property arises from the duty of the one placed in possession to properly control and manage it.

**4.—Charge—Liability—Negligence—Child Scalded.**

Charge held correct which made defendant liable for injuries to a child scalded by steam and hot water from a stationary engine at defendant's pumping station, if he was on the premises with the knowledge and consent of defendant's servant; facts held to support a recovery for negligence in such case.

**5.—Same—Contributory Negligence—Evidence.**

A charge requiring the jury to find that the evidence establishes the existence of a specific group of facts before they can find for defendant on its plea of contributory negligence approved.

**6.—Same—Same—Degree of Care to Avoid Injury.**

A charge defining contributory negligence as to a child injured to be a failure on his part to exercise, for his own safety, such a degree of care as would have been reasonably expected of him, instead of such a degree of care as is reasonably to be expected from children of his age, was correct and required by the fact that plaintiff was a dull boy and might not have such discretion as is reasonably to be expected from a child of his age.

**7.—Burden of Proof—Charge.**

Facts in this case held to warrant a charge on burden of proof.

Appeal from the District Court of Grayson. Tried below before Hon. J. M. Pearson.

*Baker, Botts, Baker & Lovett and Head & Dillard*, for appellant.

*Wolfe, Hare & Maxey*, for appellee.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by appellee to recover damages for personal injuries inflicted by the alleged negligence of appellant. The defenses plead were not guilty and contributory negligence. The trial resulted in a judgment in favor of the plaintiff for \$4000, which is appealed from.

*Conclusions of Fact.*—On the 8th day of March, 1902, the defendant owned and maintained, in connection with its railway, a pumping station at Denison, which was in charge and under entire control of its



servant, E. M. Hood, who had authority to forbid and prevent parties from trespassing upon the premises where situated. The motive power for the pumps was furnished by an engine, installed in a rectangular building, situated fifty or sixty feet east of the railroad track. There was a well twelve or fourteen feet east of the house. A pipe extended through the north wall of the building to a tank on the outside through which water was conveyed. Water was pumped from the well to a tank and conveyed from the tank through a pipe, extending therefrom through the north line of the building to a barrel, standing inside, from which water was supplied the boilers of the engine. Extending from the boiler to the west was a pipe, the end of which lay on the doorsill of the building, through which hot water and steam, when necessary, was blown from the engine.

On the day referred to the plaintiff, a minor, about 13 years of age, was at the pumping station and was scalded by water and steam let off from the engine by Mr. Hood, through the pipe, the end of which lay on the doorsill.

The facts so far are shown by the undisputed evidence, and are stated only because of their pertinency to controverted facts at issue. These are: (1) Was the defendant guilty of negligence proximately causing plaintiff's injury? (2) If so, was the plaintiff guilty of contributory negligence? And (3) if not guilty of such negligence, what is the quantum of his damages?

In reaching our conclusions on these issues we will be guided by the well-established principle that the most favorable inferences which the entire evidence will authorize should be drawn in support of the verdict.

1. Upon the first question the evidence is reasonably sufficient to show these facts: (1) That the plaintiff went on the premises in company with defendant's servant, Hood, who was in exclusive control thereof, at his invitation and remained there, until injured, with his consent; (2) that the premises were dangerous to persons of plaintiff's age, intelligence and experience; (3) that the dangerous character of the premises to persons of plaintiff's immature age and discretion were known to Hood when he allowed plaintiff to go there with him, or should have been known by one occupying the relation he did to the company of ordinary prudence and discretion; (4) that while plaintiff was on the premises Hood gave him a wheel-shaped instrument and directed him to turn off the water with it flowing through the pipe extending from the tank to the barrel in the pumphouse; (5) that when plaintiff was returning, after shutting the water off as directed, Hood, without plaintiff's knowledge, without exercising such care and prudence for plaintiff's safety as would have been exercised under the same or like circumstances by a man of ordinary care and prudence, turned the valve of the pipe through which hot water and steam were expelled from the boiler of the engine, and plaintiff, before he knew of the flow of the water and steam, stepped in front of the end of the pipe on the doorsill and was badly scalded.



The verdict involves the finding of these facts by the jury; and, from them, the ultimate fact that defendant was guilty of negligence proximately causing plaintiff's injury. And as the question of negligence is for the jury except in such cases where the facts are such that all reasonable men must draw the same conclusion from them, we conclude, upon the first question stated, as is shown by the verdict.

2. As the burden of proving contributory negligence was on the defendant, and as it can not be said from the evidence, as a matter of law, that plaintiff was guilty of such negligence, we conclude, as found by the verdict, that contributory negligence on the part of plaintiff was not shown.

3. Upon the question of the amount of damages, the evidence shows that plaintiff was severely scalded on both legs, on one extending from the upper third of the thigh to the heel; that he suffered the most intense pain for over three months; that the burns did not permanently heal until the next December following the date of infliction; that the skin proper on the right leg and in patches on the left was destroyed; that in healing, the scars had contracted upon the blood vessels and the pressure interfered with the circulation of the blood, and would probably cause varicose veins and trouble in after life.

In view of these facts, which the evidence warranted the jury in finding, we can not say against the verdict that the damages assessed are excessive.

*Conclusions of Law.*—1. W. T. Booth, a witness for plaintiff as to the nature and character of his injuries, was, on cross-examination, asked if he was not the same W. T. Booth whom an indictment for perjury had been returned against in the District Court of Grayson County. Had there been no objection the witness would have given an affirmative answer. But the testimony sought to be drawn out by the question was objected to upon the grounds that it was immaterial and the witness could be impeached only by showing his general reputation for truth and veracity. The objection was sustained and the witness not permitted to answer. Then the defendant offered in evidence an indictment returned, about three years prior to the trial of this case, to the District Court of Grayson County charging the witness Booth with perjury. Its admission was objected to upon the same grounds that the answer to the question was, and the objection was likewise sustained.

It is insisted by appellant in its first and second assignments that the court erred in sustaining the objections to the testimony thus offered.

It is elementary that in impeaching the credit of a witness the examination must be confined to his general reputation, and not be permitted as to particular facts.

The grounds upon which this rule rests—that testimony from other witnesses of particular instances of misconduct is an improper mode of



discrediting a witness, because of the confusion of issues and waste of time that would be involved, and because of the unfair surprise of the witness, who can not know what variety of false charges may be specified and can not be prepared to expose their falsity—have no application where the discrediting fact is the conviction of a crime, because the proof, by the record of conviction, does not lead to confusion of issues, and does not operate upon the witness for unfair surprise. Nor does the general rule apply, for the reasons upon which it is founded do not exist, in bringing from the mouth of the witness himself, upon cross-examination, particular acts of *his own* conduct, affecting his character. But even here there is a limitation as to relevancy of the conduct sought to be proven on cross-examination to the character of the witness for truth; for not all misconduct indicates that a witness is such a character as may not speak the truth under oath. On principle, only such misconduct as imputes a lack of truthfulness or honesty should be inquired into on cross-examination, e. g., fraud, forgery, perjury, etc. Greenl. on Ev., 16 ed., sec. 461c. But does the fact that a witness has been indicted for an offense which, if he is guilty of, would show such moral turpitude as would affect his character for truth and honesty, without more, tend to impeach or discredit him as a witness? The fact that such indictment has been made, in our opinion, does not tend to show the commission of the offense charged, or conduct discrediting the witness. No presumption of guilt arises from it; on the contrary the presumption is that the accused is innocent until his guilt is established by legal and competent testimony. The mere fact that the witness has been indicted for an infamous offense is foreign to any issue, and if it be not evidence tending to impeach his character, its admission in evidence can subserve no end of justice nor any useful purpose.

The question and answer sought to be elicited by it could serve only to degrade and humiliate the witness. "A question which is alike degrading to answer or decline to answer, should never be put unless, in the judgment of the court, it is likely to promote the ends of justice. A rule which would license indiscriminate assaults on private character under the forms of law, would contribute little to the development of truth and still less to the furtherance of justice. It would tend neither to elevate the dignity of our tribunals, nor to inspire a reverence for our systems of jurisprudence." Third Gt. West. T. Company v. Loomis, 32 N. Y., 140. One forfeits no rights by becoming a witness. Of all places in the world where one should be treated justly it is in a court of justice. And when called there as a witness he has the right to expect that he will be justly dealt with, and, unless the ends of justice require that his misdeeds should be exposed, when he has properly demeaned himself and spoken the truth on the witness stand, he should be allowed to go about his business without anything having been said or done that would humiliate or degrade him or lower his character in the estimation of the public. Trial courts



have the discretion to set limits to the cross-examination of a witness on matters of his conduct affecting his character, irrespective of the relevancy of such matters, and to forbid it whenever it seems to be unnecessary, profitless or undesirable (*Third Gt. West. T. Co. v. Loomis*, supra; *Territory v. Chavez*, 45 Pac. Rep., 1107), and unless such discretion has been abused its action on such an examination will not be reviewed. It is apparent to our minds that in the present case such discretion was not abused, but rightfully exercised in excluding the testimony involved in these assignments of error.

2. The testimony offered by appellant, by which it sought to prove by Hood that when he was in charge of one of its pumping stations at Navasota instructions were given him that pumpers at pumping stations should not permit boys or others to come upon such premises, and that such instructions were general and given for witness' guidance while in charge of any pumping station, the exclusion of which is the basis of the third assignment of error, in our opinion is immaterial to any issue so far as the merits of this case are concerned. Hood testified that no authority had been given him to invite anyone to come on the premises where appellee was injured, and that if plaintiff had ever been in the pumphouse with him before he got hurt, witness did not remember it. This testimony substantially established the fact that Hood had no authority to invite appellee to go into the pumping house or on or about the premises where it was maintained. Nothing more could have been shown by the testimony excluded. It is immaterial whether such instructions were given Hood or not, or whether he was authorized to invite persons on the premises. For he was placed by appellant in exclusive management and control of its pumping house, its appliances and appurtenant premises, and the rule is that when one places his property in the exclusive possession and control of another, the right to protect the possession from intruders and to prevent any interference with the property arises from the duty of the one placed in such possession to properly control and manage it. *Galveston H. & S. A. Ry. Co v. Zantzing*, 93 Texas, 64. Had it been proven that Hood had specific orders from the company not to allow anyone to come on the premises, his disobedience of such orders in inviting and allowing appellee there would be no defense to this action. *Missouri K. & T. Ry. Co. v. Rodgers*, 89 Texas, 675; *Cook v. Navigation Co.*, 76 Texas, 353. This also disposes of appellant's fourth assignment of error.

3. The fifth paragraph of the court's charge is as follows: "If you believe from the evidence that defendant's employe, E. M. Hood, invited and permitted plaintiff to go upon the premises upon which said pumphouse was located, and knowingly permitted him to remain thereon, and if you further believe that said pumphouse and premises were dangerous for persons of plaintiff's age, intelligence and experience; and if you believe that such fact, if it was a fact, was known to said Hood, or ought to have been known to him by the exercise of ordinary



care; and if you further believe that in so inviting him and permitting plaintiff upon said premises, if the said Hood did invite and permit him to be there, the said Hood was guilty of negligence, as that term has been heretofore defined; and if you further believe that said negligence, if any, was the proximate cause of plaintiff's injury, you will find for the plaintiff, and assess his damages as hereinafter directed, unless you find for defendant under other portions of this charge."

As we understand it this is an accurate enunciation of the law applicable to the case made by the pleadings and evidence and is not obnoxious to any of the objections urged against it by appellant's propositions asserted under the fifth assignment of error. *Missouri K. & T. Ry. Co. v. Rogers*, 89 Texas, 675; *St. Louis S. W. Ry. Co. v. Abernathy*, 28 Texas Civ. App., 613, 68 S. W. Rep., 539; *San Antonio Water Co. v. White*, 9 Texas Civ. App. 465, 44 S. W. Rep., 181; *Dublin Cotton Oil Co. v. Jarrard*, 91 Texas, 289, 40 S. W. Rep., 531; *Cook v. Navigation Co.*, 76 Texas, 353; *Evansich v. Railway Co.*, 57 Texas, 128; *Ollis v. Railway Co.*, 31 Texas Civ. App., 601, 73 S. W. Rep., 30; *Thompson v. Railway Co.*, 11 Texas Civ. App., 307, 32 S. W. Rep., 191; *Galveston H. & S. A. Ry. Co. v. Zantzinger*, 93 Texas, 64; *Rosenburg v. Durfree*, 87 Cal., 545, 26 Pac. Rep., 793; *Chicago M. & St. P. Ry. Co. v. Hoherty*, 53 Ill. App., 282; *Britt v. Eddy*, 115 Mo., 596, 22 S. W. Rep., 488; *Hestonville, etc., Ry. Co., v. Biddle*, 16 Atl. Rep., 488.

4. So much of the sixth special instruction requested by appellant as is the law applicable to this case is embodied in the sixth paragraph of the court's general charge, and therefore the court did not err in refusing such special instruction.

5. The sixth paragraph of the charge simply requires the jury to find whether the evidence establishes the existence of a specific group of facts which, if true, would in law establish appellant's plea of contributory negligence, and instructs them that if they should find such group of facts established by the evidence to find for defendant. This method of presenting a defensive issue has been commended by the Supreme Court. *Missouri K. & T. Ry. Co. v. McGlamory*, 89 Texas, 635; *Missouri K. & T. Ry. Co. v. Rodgers*, 91 Texas, 58. In view of the opinions of the Supreme Court in these and other cases, the paragraph of the charge in question, instead of being regarded as erroneous, should be commended. The last clause of the paragraph in question, which is, "Or, if you believe from the evidence that his failure to use such care and observation to discover and avoid the danger, if you believe that he did fail to do so, contributed to his injury, then you will find for the defendant," clearly relieves it of the objection urged.

6. It is complained in the eleventh assignment of error that the court erred in defining contributory negligence as to plaintiff to be such negligence or failure on his part to exercise, for his own safety, such a degree of care as would have been reasonably expected of him,



taking into consideration his age, experience and intelligence at the time of the accident. The principle that the normal measure of the caution required from a lawful man must be fixed with regard to other men's normal powers of taking care of themselves, has no application to children. A child is deemed to think and act as a child, and it is only when he becomes a man that he is expected to put away childish things. And when one sees a child exposed to risk from one's action, proportionate care is required, and it is immaterial that the child would not be there but for the carelessness of some parent or guardian or servant. Hence it is settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age. Webb's Pollock on Torts, 565, 566; Shearm. & Redf. on Neg., sec. 73. The part of the charge complained of, while not literally, is in substantial compliance with these principles; and when it is considered that the evidence strongly tends to show that the plaintiff was a dull boy and might not on that account have had such discretion as is reasonably to be expected from a child of his age, we are of the opinion that the slight departure in the charge from the general rule of contributory negligence, as applicable to children, was not error, but was required by the particular facts in this case. In fact the rule is laid down by the Supreme Court of this State that to determine the question of liability for injury to a child it is proper to take into consideration his age, intelligence and ability to understand the character of the act performed and its consequences. Missouri K. & T. Ry. Co. v. Rodgers, 89 Texas, 675; Texas & P. Ry. Co. v. Phillips, 91 Texas, 281.

7. It is now the settled doctrine in this State that the burden of proving contributory negligence rests upon the defendant, and as the evidence shows that the hot water and steam which injured plaintiff was turned off from the engine through the pipe by defendant's servant, without exercising ordinary care for plaintiff's safety, it was not error for the court to give the jury, in its charge, the general rule as to the burden of proof.

8. Our conclusions of fact dispose of the remaining assignments of error adversely to appellant.

The judgment of the District Court is affirmed.

*Affirmed.*

Writ of error refused.



## CHARLES DERRETT ET AL. V. F. H. BRITTON ET AL.

Decided April 13, 1904.

**1.—Legal Title—Equitable Title—Innocent Purchaser.**

One who purchases land from the holder of the legal title, without notice of the existence of an equitable title in the heirs of the deceased member of the community, or of facts and circumstances reasonably sufficient to put him upon inquiry, takes title free from the claim of the owners of the equitable community title.

**2.—Community Estate—Survivor—Title—Possession—Notice.**

The facts that an heir of a deceased member of a community estate was over twenty-one years old, working elsewhere and boarding with the family on the premises, held not to show such possession as would be notice of an equitable title in him, the records showing the legal title in the survivor of the community.

## ON MOTION FOR REHEARING.

**3.—Deed—Acknowledgment—Defect.**

Save for the purpose of showing an outstanding title, or that an instrument is not admissible in evidence, no one except the grantor or some one claiming under him can take advantage of a defect in the acknowledgment of a deed.

Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*Cobb & Avery*, for appellants.

*E. B. Perkins and Bonner & Gilbert*, for appellees.

NEILL, ASSOCIATE JUSTICE.—This is an action of trespass to try title brought by appellants, Charles Derrett and Lucy McCain, joined by her husband, John, against the appellees, F. H. Britton and Southwestern Railway Company of Texas and the Dallas Terminal and Union Depot Company, to recover an undivided one-half interest in a certain lot situated in the county and city of Dallas. The defendants answered by pleas of not guilty and that they were bona fide purchasers for value without notice of any claim or interest of plaintiffs in the property. The case was tried before a jury, and the trial resulted in a judgment in favor of the defendants, from which plaintiffs have appealed.

*Conclusions of Fact.*—On and prior to the 17th day of May, 1873, Calvin Derrett and Sarah Derrett were husband and wife. On the day stated Berry Derrett and his wife, who were then the owners of the property, executed, delivered and duly acknowledged a general warranty deed conveying it to Calvin Derrett, which deed was duly recorded on the 19th day of May, 1873. From then until in 1886 or 1887, when Sarah, the wife of Calvin, died, Calvin Derrett with his family occupied the lot in controversy as his homestead. Sarah Derrett left surviving as her only heirs two children, Charles Derrett and Lucy McCain, the plaintiffs in this action. In 1889 or 1890 Calvin Derrett married



a woman named Rilla, who has no children and is still living. After his second marriage Calvin Derrett continued to reside on the lot as his homestead until the 8th day of January, 1902, when he and his wife Rilla duly executed, acknowledged and delivered to the appellee, S. H. Britton, a general warranty deed conveying to him and his heirs the property in controversy. The deed recited a consideration of \$2500, which was actually paid in cash at the time of the execution and delivery of the deed. It was acknowledged before Henry J. Martyn, a notary public of Dallas County, and duly recorded on February 5, 1902. F. H. Britton bought the property for his coappellee, the Dallas Terminal Railway-Union Depot Company, who furnished the consideration, for whom he holds in trust. The purchase of the property was effected through H. J. Martyn, who in making the purchase negotiated with Calvin Derrett and his wife, as agents of appellees.

After their father's second marriage both appellants continued to live as members of his family with him and his wife on the premises until 1898, when Lucy married her present husband, John McCain, and moved with him off the premises. After his sister's marriage Charles Derrett continued to live on the premises with the family, and was boarding there, paying his board to his father, at the time the deed was made by his father and stepmother to F. H. Britton, at which time he was over 21 years of age, and working elsewhere. After the deed was made his father acquired another homestead and Charles continued to board with him there as he had before done on the premises in controversy.

The facts thus far found are established by the uncontroverted testimony.

The question was submitted by the court to the jury as to whether or not appellees or their agent, H. J. Martyn, had notice of appellants' interest in the land until after the execution of the deed from Calvin Derrett and his wife to F. H. Britton. And in connection with the question the jury were instructed that if Martyn knew such facts as would have prompted an ordinarily prudent man, desirous of protecting himself and willing to act fairly with others, to have made inquiry as to whether or not appellants, or either of them, had any interest in said land, and if upon such inquiry being made he would have discovered that appellants had the title on which this suit is based, then that Martyn had notice of appellants' title. But if upon making such inquiry as an ordinarily prudent man would have made Martyn would not have discovered that appellants had title, or if he did not know such facts as would have prompted an ordinarily prudent man, desirous of protecting himself, and willing to act fairly with others, to make inquiry as to whether or not plaintiffs or either of them had any interest in the land, then Martyn did not have notice of appellants' title.

The finding of the jury in favor of appellees necessarily involves a finding that neither appellees nor their agent Martyn had notice of appellants' interest in said land until after the execution of the deed by



Calvin Derrett and wife to F. H. Britton. As the evidence is amply sufficient to sustain it, such finding is here made a conclusion of fact by this court.

Finally we conclude from the evidence that appellees were purchasers in good faith for value from Calvin Derrett, the holder of the legal title, as was manifest by record of the deed to him to the property in controversy without notice of the equitable title of appellants, upon which their action is based.

*Conclusions of Law.*—One who purchases land from another who holds a legal title thereto, and pays value for it without notice of the existence of an equitable title of their heirs to the deceased member of the community, or of facts and circumstances reasonably sufficient to put him upon inquiry as to such title, takes title by virtue of such purchase free from the claim of the owners of the equitable community title. *Fatty v. Middleton*, 82 Texas, 586; *Hensley v. Lewis*, 82 Texas, 595; *Mangum v. White*, 16 Texas Civ. App., 254, 41 S. W. Rep., 80; *Brackenridge v. Rice*, 30 S. W. Rep., 588; *Sanborn v. Schuler*, 86 Texas, 116; *Bass v. Davis*, 38 S. W. Rep., 268; *Saunders v. Isbell*, 5 Texas Civ. App., 513; *Burleson v. Alvis*, 28 Texas Civ. App., 51, 66 S. W. Rep., 235; *Peterson v. McCauley*, 25 S. W. Rep., 829; *Hicks v. Hicks*, 26 S. W. Rep., 229; *Rand v. Davis*, 27 S. W. Rep., 941; *Smith v. Olson*, 23 Texas Civ. App., 458, 56 S. W. Rep., 572.

As is said in *Mangum v. White*, supra, "The theory of these decisions is that the possession by the vendor of muniments showing the legal title in him is sufficient guaranty to the purchaser, until further inquiry is suggested by circumstances brought home to him, that the title is as the papers show it to be, and that if he buys upon the faith of such evidence, he is entitled to protection against those to whom the legal title is held in trust."

The facts that the appellant, Charles Derrett, was over 21 years of age and boarding with the family on the premises at the time the deed was executed to Britton, do not, in our opinion, show such possession as was in and of itself notice to appellees, or their agent Martyn, of either his or his sister's equitable interest in the property, or sufficient of themselves to put the purchasers or their agent upon inquiry. Such facts were not inconsistent with or sufficient to cast a shadow of suspicion upon the title of Calvin Derrett as it appeared from the deed to him of record in Dallas County purporting upon its face to vest full and complete title to the whole of the property. The legal meaning of the word "possession" is: "The having, holding or detention of property in one's power or command; actual seizure or occupancy." The mere fact that one who works elsewhere lodges and boards on premises the legal title to which is in him with whom he boards, and who claims and exercises full power, control and dominion over the property by virtue of such legal title, does not constitute possession such as would be notice in and of itself of any equitable in-



terest that such lodger or boarder might have in and to the premises or any part thereof. Were this not so, then it would be incumbent upon everyone desiring to purchase land from one in actual possession, control and holding dominion over property in whom the records of deeds showed full and complete title, before he could purchase with any degree of safety, to seek out and inquire of every boarder and lodger on the premises, or who had been such boarder and lodger, within a period of time not barred by the statutes of limitation, what interest such boarder or lodger had or claimed in the property. The most that can be said of such evidence is that it may be taken and considered with all the other facts and circumstances in determining the issue as to whether or not the purchaser or his agent effecting the purchase had notice or was charged with notice of the equitable interest of the party lodging or boarding on the premises.

The charge of the court properly submitted the issue as to whether appellees had notice of appellant's equitable title, and in our opinion no error was committed by the court's refusing to give any of the special charges requested by appellants. Therefore the judgment of the District Court is affirmed.

*Affirmed.*

#### ON MOTION FOR REHEARING.

It is contended in this motion that we erred in holding that appellees were innocent purchasers for value without notice, because the property in controversy was the homestead of Calvin Derrett and his wife Rilla, and the acknowledgment of their deed conveying the property to F. H. Britton was taken by H. J. Martyn, who was at that time appellees' agent for the purchase of the same.

The validity of an acknowledgment of a deed is not essential to constitute the grantee a purchaser in good faith. The essential elements which constitute such a purchaser are (1) a valuable consideration, (2) the absence of notice, and (3) the presence of good faith. If the existence and concurrence of these requisites are shown, it is immaterial, so far as a third party is concerned, whether the deed of the purchaser was properly acknowledged or not. Save for the purpose of showing an outstanding title, or that an instrument is not admissible, under the statute, in evidence, no one except the grantor or some one claiming under or through him an interest in the estate conveyed can take advantage of a defect in the acknowledgment of the deed. This may be done, not for the purpose of proving the grantee was not a bona fide purchaser, but for the purpose of showing that, on account of its defective acknowledgment, the deed is invalid; and that therefore the grantor or his privies in estate still own the property.

In the instant case the grantors, Calvin and Rilla Derrett, are not claiming the property nor questioning the validity of the deed of ap-



pellees. The appellants are the plaintiffs in the case, and are therefore not interested in showing an outstanding title, and such a title would not avail them, but would defeat their action. They do not claim through Calvin and Rilla, or either of them, but assert title to the property by inheritance from their mother, Sarah Derrett. In other words the title they claim is essentially different from, independent of and inconsistent with the one conveyed by their father and step-mother to appellees. Therefore their attitude in this suit is not such as will entitle them to question the validity of the acknowledgment of the deed under which appellees claim.

The appellees being purchasers in good faith from him in whom appeared the legal title, for a valuable consideration without notice of appellant's title, and the validity of the deed evincing their purchase not being questioned by their grantors or any one claiming under them, the ground for the motion stated is without merit.

All other questions raised by this motion are fully considered and disposed of in our prior opinion.

The motion is overruled.

*Overruled.*

Writ of error refused.



## JOHN H. SILLIMAN ET AL. V. GREEN TAYLOR ET AL.

Decided April 14, 1904.

**1.—Mechanic's Lien—Mutual Mistake—Description of Property.**

The rule that equity will correct a mutual mistake in a voluntary contract applies to a mechanic's lien which described the property upon which the lien was given as situated on lot 8 instead of lot 7; and such correction may be had though the lien is given on the homestead with the wife's separate acknowledgment.

**2.—Same—Foreclosure.**

The fact that a mistake in a mechanic's lien which described the property as situated on lot 8 instead of lot 7, was not discovered until after judgment foreclosing the lien had been obtained and the property sold under such judgment, can not defeat plaintiff's right to have said mistake corrected and a foreclosure upon the property intended to be described in the lien.

**3.—Lien—Foreclosure.**

Suit for a debt and one to foreclose a lien given to secure the debt may be brought separately.

**4.—Practice on Appeal—Pleading—Amount of Indebtedness.**

Where the amount of indebtedness due by defendants was determined in a former suit the question will not be inquired into on a subsequent suit to correct the description of property mortgaged therefor and have a new foreclosure.

**5.—Pleading—Allegations—Assignment of Claims.**

Allegations in pleading held to show assignment of claims to plaintiff and hence a right to bring the suit.

Error to the District Court of Anderson. Tried below before Hon. John Young Gooch.

*B. H. Gardner* and *W. C. Campbell*, for plaintiffs in error.

*P. W. Brown*, for defendants in error.

PLEASANTS, ASSOCIATE JUSTICE.—Plaintiffs in error, J. H. Silliman, the Silliman Hardware and Grocery Company, and Jack Freeman, brought this suit against the defendants in error Green Taylor and Lutitia Taylor, to correct a mutual mistake in the description of the property covered by an instrument of writing creating a mechanic's lien executed by defendants in favor of plaintiff Jack Freeman. The petition alleges that the instrument creating the lien, by the mutual mistake of the parties thereto, described the property upon which the lien was given as lot No. 8 in block No. A2, subdivision A of the Texas Land Co.'s addition to the city of Palestine, when in truth and in fact the property upon which said lien was given and which was intended to be described in said instrument was lot No. 7 in said block, subdivision and addition to the city of Palestine. The instrument sought to be corrected and foreclosed is set out in the petition, and is in substance a building contract and mechanic's lien executed by plaintiff Jack Freeman and the defendants Green Taylor and Lutitia Taylor, whereby said plaintiff undertakes and agrees to furnish the labor and material necessary in the construction of certain improvements upon the homestead



of defendants which is described as being situated upon lot 8 above described, and the defendants, in consideration of the construction by said plaintiff of said improvements, agree and promise to pay him the sum of \$230 with interest at the rate of 10 per cent per annum from October 15, 1901, payable in monthly installments of \$10 each, with accrued interest, and 10 per cent attorney's fees in event suit became necessary to enforce payment. It further provides that failure on the part of defendants to pay any of said installments shall at the option of said Freeman or the holder of said obligation mature the whole amount of said indebtedness. To secure this indebtedness a builder's and mechanic's lien is expressly created and acknowledged upon the above described property. This instrument was executed on the 31st day of October, 1901, and was properly acknowledged by all of the parties thereto on the following day. The petition then alleges in substance that the said Jack Freeman fully performed his contract undertaking, and that the defendants thereby became liable and promised to pay him the sum of \$230 in accordance with the terms of said contract; that thereafter Freeman transferred and assigned said contract and lien to plaintiff, the Silliman Hardware and Grocery Company, for the purpose of securing said company in an account for \$105.31 due it by said Freeman for material furnished him in carrying out his said contract with defendants, and also securing the firm of Scott & Rucker, of Palestine, Texas, in the payment of an account for \$91.53 for material furnished said Freeman in the performance by him of his said contract with the defendants; that said defendants failed to pay the installments as the same became due under said contract on January 15, 1902, and February 15, 1902, respectively, and said Silliman Hardware and Grocery Company being the legal holder of said indebtedness elected to declare the whole of said indebtedness due, and the defendants failing and refusing to pay same, said plaintiff filed suit thereon in the District Court of Anderson County on the 17th day of March, 1902, praying for judgment for the indebtedness aforesaid and for a foreclosure of said mechanic's lien; that judgment was rendered in said suit on July 31, 1902, in favor of plaintiff for the sum of \$257, with interest thereon from date of said judgment at the rate of 10 per cent per annum and foreclosing the lien upon said lot No. 8 above described; that thereafter an order of sale was issued upon said judgment and said property was sold thereunder on October 8, 1902, and plaintiff J. H. Silliman became the purchaser thereof for the sum of \$200, and the sheriff of Anderson County executed and delivered to him a deed therefor; that in making said purchase said plaintiff acted for his coplaintiffs, the Silliman Hardware and Grocery Company and Jack Freeman, and also for the said Scott & Rucker; that after his purchase at said sale he paid to Scott & Rucker the amount of their said claim, to wit, \$91.53, to the Silliman Company \$105.31, and for costs of court and attorney's fees \$45.95, making a total of \$242.79; that said judgment has been transferred to him and that he holds the same for said Jack Freeman and as security



for the sum paid out by him as aforesaid. It is further alleged that in each and all of the transactions above mentioned all of the parties intended and understood that said mechanic's lien was upon lot No. 7 as hereinbefore described, and not upon lot No. 8 as described in said lien, judgment and sheriff's deed; that both of said lots belonged to defendants at the time said lien was executed and constituted their homestead, but that No. 8 had no improvements thereon, and was not at that time and is not now worth exceeding \$100, while lot No. 7 upon which said improvements were erected is worth with said improvements the sum of \$330. It is further alleged that defendants are wholly insolvent; that after said sale under said judgment plaintiff J. H. Silliman was placed in possession of said lot No. 7, but that defendants having on January 20, 1903, discovered the mistake in the description of said property contained in said contract, judgment and sheriff's deed, have retaken possession of said premises and refuse to correct said mistake or surrender said premises to plaintiff. The plaintiffs offer to reconvey to defendants said lot No. 8, and pray that they have judgment correcting the mistake in said contract and judgment, and for equity and general relief.

The defendants excepted to this petition upon the following grounds:

1. Because it shows upon its face that a suit had previously been brought by one of the plaintiffs herein who was then the legal holder and owner of the contract sought to be corrected in this suit, and the lien created by said contract was foreclosed upon the property therein described, and plaintiffs are not now in law or equity entitled to have said judgment in said former suit changed and made to foreclose said lien upon a different lot or parcel of land from that described in said contract, it appearing that no other judgment could have been rendered in said former suit under the pleadings therein and that said judgment was therefore not rendered by mistake.

2. Because the contract sought to be corrected created a lien upon the homestead of defendants, and a contract of this character can not be corrected after it has been executed and delivered.

3. Because said petition does not show any assignment to plaintiff J. H. Silliman of the alleged accounts of the Silliman Hardware and Grocery Company and Scott & Rucker, or any right of subrogation in him.

4. Because the petition shows no privity of contract between J. H. Silliman, the Silliman Hardware and Grocery Company and Scott & Rucker and these defendants.

5. Because the costs and attorney's fees in the previous suit are not secured by the lien sought to be enforced in this suit.

These exceptions were all sustained by the trial court, and plaintiffs declining to amend their petition the suit was dismissed.

We think the petition shows a good cause of action and none of defendants' exceptions thereto should have been sustained.

The jurisdiction or power of courts of equity to relieve against mistakes



has always been recognized and frequently invoked, and it is familiar law that equity will correct an erroneous description of property contained in a voluntary conveyance whenever the misdescription is due to the mutual mistake of the parties to the instrument. The exercise of this power in the correction of a mutual mistake in the description of property contained in the deed of a married woman conveying her separate property or her homestead in no way conflicts with the Constitution or laws of this State prescribing the manner in which such conveyances shall be executed. The correction of such mistake does not in the least change the voluntary character of the conveyance nor lessen in the slightest degree the protection which our Constitution and statutes are designed to give to the separate property and homestead rights of married women. When a conveyance has been properly executed by a married woman the correction of a mutual mistake in the description of the property therein contained does not create a new contract, but merely makes the written evidence of the contract which has been legally executed speak the truth and conform to the intention of the parties, in order that injustice and fraud may be prevented. We think the facts alleged in plaintiffs' petition called for the application of the rule that equity will correct a mutual mistake. *Avery v. Hunton*, 56 S. W. Rep., 211; *Gardner v. Moore*, 75 Ala., 394; *Hamar v. Medsker*, 60 Ind., 413; *Carper v. Munger*, 62 Ind., 481; *Styers v. Robbins*, 76 Ind., 547; *Society v. Meeks*, 66 Cal., 371; *Stevens v. Holman*, 44 Pac. Rep., 670; *Christensen v. Hollingsworth*, 53 Pac. Rep., 211.

The fact that the mistake was not discovered until after suit had been brought upon the contract and judgment obtained foreclosing the lien, and the property described in the contract had been sold under said judgment, can not defeat the plaintiffs' right to have said mistake corrected and a foreclosure of his lien upon the property intended to be described in said contract.

The plaintiffs offered to do equity in the matter by reconveyance of the property obtained by the sale under the judgment of foreclosure in the former suit, and it would violate no rule of law or equity to set aside the judgment in the former suit which foreclosed the lien upon the wrong property and to order a foreclosure upon the property intended to be described in the contract, and the sale of such property to satisfy said lien. It is well settled that a suit for the debt and one to foreclose a lien given to secure the debt may be brought separately.

The amount of the indebtedness due by the defendants was determined in the former suit and in the absence of allegations and proof of fraud that question can not be inquired into in this proceeding. The allegations as to the several amounts paid by plaintiff J. H. Silliman to his coplaintiffs and Scott & Rucker were made in order to show that he purchased the previous judgment for a valuable consideration, and are sufficient to show such privity between him and the defendants in the execution of the original contract as entitles him to maintain



this suit. The contract provided for the payment of attorney's fees, and such fees and the costs of the original suit were adjudged in said suit to be secured by the lien given by the contract and the correctness of that adjudication can only be attacked on the ground of fraud.

The judgment of the court below will be reversed and this cause remanded for a new trial, and it is so ordered.

*Reversed and remanded.*



## HIRSCH BROS. V HENRY ASHE.

Decided April 14, 1904.

**1.—Personal Injuries—Negligence—Defective Ladder.**

Evidence considered and held sufficient in an action to recover damages for personal injuries caused by plaintiff's falling from a ladder, to require a special charge submitting the issue of defendant's knowledge of defects when they furnished the ladder to plaintiff.

**2.—Contributory Negligence—Pleading.**

Contributory negligence not having been pleaded and plaintiff's evidence not having shown, as a matter of law, that he was negligent in the use of a ladder furnished him by defendants, it was not error to fail to charge on contributory negligence.

Error to the District Court of Harris. Tried below before Hon. Wm. P. Hamblen.

*Brashear & Dannenbaum*, for plaintiffs in error.

*Cobb & Campbell* and *Wilson & Jackson*, for defendant in error.

GARRETT, CHIEF JUSTICE.—This action was brought by Henry Ashe against Hirsch Bros. to recover damages for personal injuries received by the plaintiff on account of their alleged negligence while plaintiff was in the employment of the defendants as a porter in their store at Houston. The plaintiff was directed to wash a transom above a show window and was furnished by the defendants with a ladder for the purpose. After doing the work and while descending with his back to the ladder he fell and broke his right leg just above the ankle. As to the cause of the fall the evidence was conflicting. In behalf of the plaintiff there was evidence to the effect that the ladder broke or that a rung parted from the carriage or side to which it was nailed; and on behalf of the defendant that no such break occurred but the fall was due to a misstep made by the plaintiff while coming down the ladder.

The plaintiff averred in his petition "that the ladder so furnished plaintiff by defendant was wholly insufficient and fatally defective; that such insufficiency and defective condition of said ladder was not patent and open to his observation and the same was unknown to plaintiff and unsuspected by him; that the insufficiency of said ladder and its defective condition were known to the defendants, or by the use of ordinary care might have been known to them," and it was alleged that the injuries were the result of the negligence of the defendants in furnishing the defective ladder. It is contended by the defendants that the evidence was not sufficient to charge them with negligence in this respect, and that the court erred in refusing the following special instruction requested by them, viz:

"The jury are charged that the master is liable for defects in appliances furnished his servant with which to work only when he knew or by the exercise of ordinary care could have known of the existence of



such defects. Unless, therefore, you believe from the evidence that the ladder broke as alleged by plaintiff, because of some defect therein, and that the defendants knew or could have known of the existence of such defect, if any, by the exercise of reasonable care, then you will return a verdict for defendants."

There was sufficient evidence to require the submission of the issue. It was a ladder in use in the store and was furnished personally by one of the defendants for the plaintiff's use, and there was evidence tending to show that the ladder produced by the defendants at the trial was not the one furnished the plaintiff, which would tend to show a suppression of evidence.

The charge of the court, however, in submitting the issue to the jury was in the following general language:

"And if you further believe from the evidence that the defendants negligently failed to furnish plaintiff with a proper and sufficient ladder, that is, one which was reasonably safe with which to do his work as directed, and negligently furnished him with a defective and insufficient ladder which was not reasonably safe for the purposes for which it was used, etc., you will find for plaintiff. If you do not believe from the evidence that plaintiff's injuries were and are the proximate result of negligence upon the part of the defendants, then you will find your verdict for the defendants." And further: "You are charged that negligence is the failure to exercise ordinary care; that is to say, it is a failure to exercise that degree of care which a reasonably prudent man would have exercised under the same or similar circumstances."

While this would not be positive error requiring a reversal of the case when considered in connection with the pleading, it was error to refuse the defendants' requested instruction defining the circumstances under which they should be held negligent. They had the right to have the attention of the jury directed specifically to the defense that they did not know of the defect in the ladder, if it was defective, and could not by the exercise of ordinary care have discovered the same. Contributory negligence not having been pleaded and the plaintiff's evidence not having shown as a matter of law that he was negligent in the use of the ladder, it was not error to fail to charge contributory negligence. For the error indicated the judgment of the court below is reversed and the cause remanded.

*Reversed and remanded.*



## N. L. CLEMENTS ET AL. v M. E. BUCKNER.

Decided April 14, 1904.

**Motion for New Trial—Appeal.**

A motion for new trial which is not passed on during the term in which it is filed but continued, is discharged by operation of law upon adjournment of court for that term and any subsequent action of the court with reference thereto was without jurisdiction and void, and appeal must be taken within the time limited from the date of the judgment, not from that of overruling the motion.

Appeal from the District Court of Shelby. Tried below before Hon. Tom C. Davis.

*D. M. Short & Sons*, for appellants.

*R. S. Bryarly*, for appellee.

## ON MOTION FOR CONCLUSIONS.

GARRETT, CHIEF JUSTICE.—The appeal in this case was dismissed upon the motion of the appellee for the want of jurisdiction, the appellants, having failed to file an appeal bond within the time prescribed by law. The judgment appealed from was rendered at the January term, 1903, of the District Court of Shelby County. A motion for a new trial was seasonably filed but the court adjourned on February 7, 1903, without having acted on the motion, except that there appears in the record without date the following order: "Buckner v. Clements et al.—On the matter the motion of a new trial in said cause by consent of the parties, the same is to be under advisement to the next term of the court." At the next term of the court commencing July 13, 1903, and ending August 15, 1903, the plaintiff, by a motion filed July 13th, moved the court to strike the motion for a new trial from the docket and that the judgment rendered January 6, 1903, be held to be the final judgment. But the court overruled the motion, to which the plaintiff excepted; and having taken up and considered the motion for a new trial the court also overruled it and the defendants excepted and gave notice of appeal, and on September 4, 1903, filed an appeal bond which was approved by the clerk. It appears from affidavits filed in this court that on call of the motion docket at the January term this motion was called but not read to the court; that the court asked for the consent of parties that it might be continued until the next term; but the plaintiff objected and finally consented only when the court told him that if he did not consent the court would grant a new trial then. The appellant contends that the motion was under submission and was taken over for advisement, as the record shows, and it is so considered by this court. It is the opinion of the court that the motion was discharged by operation of law upon adjournment of the court below. Any subse-



quent action of the trial court with reference thereto was without jurisdiction and void. Rev. Stats., art. 1374; Luther v. Telegraph Co., 60 S. W. Rep., 1029; Lightfoot v. Wilson, 32 S. W. Rep., 331; McKean v. Ziller, 9 Texas, 58. It follows that the appeal bond was not filed within the time prescribed by law and that this court is without jurisdiction of the appeal.



## TUCKER, ZEVE &amp; Co. v. W. T. THOMAS.

Decided April 15, 1904.

## 1.—Landlord and Tenant—Rent.

In a suit by a landlord against a tenant upon an account for rent and advances furnished the tenant, no lien could be enforced on items for pasturage of stock and hire of a team, these being separate and distinct from the contract for rent.

## 2.—Conversion.

Suit for the value of two bales of cotton, alleged to have been converted by defendants, a firm, can not be maintained where it is not shown that the person to whom they were sold was a member of such firm or acted for them or that the cotton was ever in possession of defendants.

Appeal from the District Court of San Augustine. Tried below before Hon. Tom C. Davis.

*Davis & Davis*, for appellants.

No briefs for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellee brought this suit against J. C. Nations, who was a tenant upon his farm, upon an account for \$63.59 for rent and for advances furnished said tenant. The appellants were made parties defendant under allegations charging them with the conversion of two bales of cotton upon which appellee held a lien to secure the payment of his account. The trial in the court below without a jury resulted in a judgment for the plaintiff against the defendant Nations for the sum of \$63.59 and against the appellants for the sum of \$59.69, the value of the cotton alleged to have been converted.

The account sued on contains among other items the following: "To pasturage for six head of stock from March 1, 1902, to October 15, 1902, at 50 cents per head per month, \$18." "To hire of team, \$4."

The evidence indicates that the contract between appellee and Nations for pasturage of the six head of stock was separate and distinct from the contract for the rent of the farm, and it is not shown that the stock pastured were the work stock used by Nations in cultivating said farm. The item of \$4 for hire of team was shown to be for the hire of a team used by Nations for purposes not connected with the cultivation of appellee's farm. From this statement of the record it is clear that the appellee had no lien upon the crop raised by Nations to secure the payment of the two items in the account above mentioned.

The two bales of cotton alleged to have been converted by appellants were shown to have been sold by Nations to Hal Tucker. There is no evidence that Hal Tucker was a member of appellant firm or that he acted for said firm in purchasing said cotton, nor is there any evidence



that the cotton was ever in the possession of appellants. Such being the state of the evidence it is manifest that no judgment against appellants can be sustained. It follows that the judgment of the court below against appellants must be reversed and the cause remanded for a new trial. The judgment against defendant Nations is undisturbed.

*Affirmed in part; reversed and remanded in part.*



## TEXAS CENTRAL RAILWAY COMPANY v. H. C. PELFREY.

Decided April 16, 1904.

**1.—Railroads—Negligence of Foreman of Gravel Train—Assumed Risk.**

Evidence considered and held to show that the foreman of a gravel train, on which a steam shovel was being operated, was guilty of negligence in ordering the machinery to be moved at a time when plaintiff, one of the hands, was in a position to be injured thereby, and that the danger of such position, resulting from the order, was not a risk which plaintiff had assumed.

**2.—Same—Fellow Servants—Gravel Train.**

Employees of a railway company engaged in loading a train of flat cars with gravel and hauling same to make a fill on the main line are engaged in "operating a train" within the meaning of the statute making railway companies liable for injuries to an employee resulting from the negligence of a fellow servant.

**3.—Same—Negligence of Fellow Servant Concurring with that of Foreman.**

The negligence of a fellow servant, concurring with that of a vice-principal, will not relieve the master from liability for injury resulting therefrom.

**4.—Same—Contributory Negligence—Issue for Jury.**

Whether or not plaintiff was guilty of contributory negligence in occupying the position he was in at the time of the accident, instead of another position he might have taken, was an issue for the determination of the jury.

**5.—Charge—Uncontroverted Issue.**

Where there is no controversy in the evidence as to a given matter, it is not error to refuse a requested charge submitting that matter to the jury as an issue.

Appeal from the District Court of Eastland. Tried below before Hon. J. T. Cunningham, Special Judge.

*J. R. Warren, J. A. Kibler, and Clark & Bolinger, for appellant.*

*D. G. Hunt and W. E. Conner, for appellees.*

SPEER, ASSOCIATE JUSTICE.—H. C. Pelfrey and J. C. Pelfrey, son and father, respectively, sued the Texas Central Railroad Company and recovered a judgment for damages for personal injuries to the son, who was a minor. The injuries consisted in the mangling of the great toe of the right foot, necessitating its amputation. The allegations of the petition were, in substance, that plaintiff H. C. Pelfrey was employed by defendant as a laborer, and with other employes was engaged in the work of operating a train of cars, loading the same with dirt and gravel by means of a steam shovel. That the agencies thus employed in the work of hauling dirt and gravel were under the control and management of one Byrd, defendant's foreman. That plaintiff H. C. Pelfrey was inexperienced in such work, and ignorant of the dangers incident to the use of the steam shovel, and that the foreman failed to warn him. That by order of the foreman the keg of drinking water, which supplied the train crew, was placed among the timbers of the shovel machinery on the cars, and the employes were instructed to go there for their drinking water. That at a time when said machinery was not in motion said



Pelfrey in a proper manner approached the drinking keg, and while in the act of procuring water, the foreman negligently, without giving warning, as he should have done, gave the signal which caused said machinery to move forward on the car, rolling upon and crushing his foot, resulting as aforesaid. The father also claims damages for the remaining years of the minority of his son.

Defendant answered pleading that the injuries were the result of the negligence of a fellow servant, contributory negligence of and assumed risk by the plaintiff. There was a trial before a jury resulting in a verdict in favor of the son for \$1000, and in favor of the father for \$300. The railroad company appeals.

We conclude that the evidence is sufficient to establish that appellant was negligent in the particulars alleged in appellees' petition, proximately causing the injuries complained of; that appellee H. C. Pelfrey was himself free from negligence, and that he did not assume the risk of the accident which resulted in his injuries. J. C. Byrd testified: "I was steam-shovel foreman for the defendant. At that time I was engaged in the business of loading gravel on the Texas Central Railroad at Morgan, Texas, loading the same on flat cars with the steam shovel. H. C. Pelfrey was working under me at that time; he was working on a flat car in front of the steam shovel, and that day he came around upon the steam shovel gear work to get a drink of water. I saw him get the water out of the keg and step down upon the floor of the flat car and place his foot under the roller. Just then the shovel pulled back and the machine rolled forward. I heard him halloo. I stopped the shovel immediately, but his foot was under the roller. \* \* \* At the time of the accident I was directing the operation of the shovel, and was standing about thirteen feet from plaintiff when he was injured. \* \* \* The steam shovel moved two or four feet along the flat car at intervals as it was being operated. I can not remember that I gave the signal to move the shovel at the particular time Pelfrey was hurt, but it was my duty to control the moving of the machine at all times, and I did it by signals."

H. C. Pelfrey testified: "We had worked about one hour after the water had been placed upon the machine when I started to get a drink of water. At this time the machine lacked about two feet being to the end of the car which it was on. This space I had cleaned off, and also the front end of the car next to it. The machine had just moved up and stopped, and immediately after the machine had stopped I went around to the end of the coal box and stepped on the beam of the flat car on which the machine was, and stepped in the space between the outside sill and the middle sill and up to the keg of water, took the dipper, dipped up the water and was drinking, when the machine was moved forward and the roller caught my great toe of my right foot. \* \* \* Mr. Byrd was about twelve feet from me and in plain view of me when drinking. His face was not exactly to me, but rather the side of his face. There was a space on top of the flat car about two



and a half feet wide and four or five feet long between the center sill and the middle cross sill, and I was standing in this space when I was hurt. \* \* \* I did not see Mr. Byrd motion for the shovel to move, but he was there at his place of duty where he had always before given the signal for it to move, and the shovel never moved without the signal. I had noticed Byrd the day before, when he wanted the machine moved he nodded his head. Byrd, the foreman, would give the signal to Jack Miller, the leverman, and then the machine would move. I never saw Byrd nod to Miller to move the machine when I was hurt. I just went up to the keg to drink and at once began drinking. Byrd was in plain view of me and could have seen me. The machine had just moved up and stopped, and then I at once went to the water keg and at once began drinking when the machine moved before I was through and caught me. \* \* \* I never saw the rollers the day before, for the machine was then parallel with the car and the framework of the machine was entirely hid from view by the housing or cover." J. A. Wood testified: "Just before Pelfrey had dipped up his water, I had thrown a shovel of coal, and was then looking at Mr. Byrd, and saw him give the signal to move the machine forward. I at once jumped at Pelfrey and hallooed. At the time of the accident I had just fired the boiler and started to get a drink of water, and I saw Henry standing at the keg. He was either caught in the act of taking a drink or drinking."

The special charge of appellant requesting the submission of the issue of injuries received through the negligence of Miller, the fellow servant of appellee H. C. Pelfrey, was properly refused for two reasons. The evidence did not fairly raise such issue, and if it had done so, the negligence of a fellow servant would not have been a defense in this case, since the plaintiff and his coemployees were engaged in operating a train within the meaning of our fellow servant statute. The work in hand consisted in loading the train of flat cars with dirt or gravel, and hauling the same to make a fill on the main line of appellant's road. The cars were loaded with a steam shovel, but this was merely an expeditious means to an end, and in no way changes the nature of the work the train crew was engaged in, to wit, operating a train of flat cars for the purpose of carrying dirt to make a fill. *Texas & P. Ry. Co. v. Webb*, 31 Texas Civ. App., 498; 7 Texas Ct. Rep., 34, 72 S. W. Rep., 1044; *Seery v. Gulf C. & S. F. Ry. Co.*, 34 Texas Civ. App., —, 8 Texas Ct. Rep., 925.

Of course the negligence of a fellow servant, even conceding that the crew was not operating a train, if it concurred with the negligence of the vice-principal, would not relieve the master. *Ray v. Pecos & N. T. Ry. Co.*, not yet reported; *American Cotton Co. v. Smith*, 29 Texas Civ. App., 425, 5 Texas Ct. Rep., 392; *St. Louis S. W. Ry. Co. v. Smith*, 30 Texas Civ. App., 336, 5 Texas Ct. Rep., 815.

The appellee H. C. Pelfrey, when he entered the service of the appellant, assumed the risks ordinarily and naturally incident to a proper operation of the steam shovel and cars, but did not assume the risk of



his foreman's negligence in rolling the machine over him at a time when such foreman ought to have seen him, hence appellant's special charge number 3 was properly refused. It was not applicable to the facts of this case; the main charge was more appropriate. The question of appellee's standing on the floor of the car, rather than upon the framework of the machine,—which, if it constituted a defense, could not be classed as an assumption of the risk of injury,—was properly submitted in the main charge as contributory negligence.

Special charge number 1 requested by appellant was properly refused because, if for no other reason, it sought to submit to the jury as doubtful the question whether or not the foreman, Byrd, knew of the dangerous position of Pelfrey's foot, or could have reasonably anticipated such danger, when the foreman himself says, which is undisputed, that he saw Pelfrey take the place of danger and put his foot in front of the roller. The real issue was whether Byrd gave the order which set in motion the heavy machinery. This the jury resolved in favor of appellees.

We think the issues in the case were fairly submitted in the charge of the court. The important issue of the contributory negligence of the injured appellee in standing on the floor of the car between the sills constituting the framework of the machinery, rather than on such sills in a place of safety, was submitted to the jury and determined adversely to appellant. We can not say their decision is wrong. It may be that a reasonably prudent person would have stood in this level space, which is shown to be some two or three feet square, rather than upon an elevated nine-inch sill, especially when he knew the machinery had just been moved forward and should not again be moved for several minutes, and not then except upon the signal of the foreman who had an unobstructed view of him.

All assignments are overruled, and the judgment affirmed.

*Affirmed.*

Writ of error refused.



## FRED W. WOLF COMPANY V. D. G. GALBRAITH.

Decided April 16, 1904.

**1.—Contract—Breach—Agreement to Give Lien on Homestead—Nonjoinder of Wife.**

The validity of a contract whereby defendant company agreed to furnish plaintiff certain ice-making machinery, to be placed on his homestead, a lien on the property to be afterwards given by defendant and wife, could not be assailed by defendant, in an action of damages for its breach, on the ground that the wife had not joined in making the contract, since defendant would be liable on it in damages should the wife refuse, at the proper time, to join in executing the lien.

**2.—Same—Measure of Damages for Breach—Profits.**

In an action for damages for breach of a contract whereby defendant agreed to sell plaintiff certain machinery, wherein the profits to be derived from the operation of the machinery are shown to have been within the contemplation of the parties, and their loss the direct result of the breach of the contract, a recovery may be had for such lost profits.

**3.—Same—Anti-Trust Statute of 1895.**

The Texas anti-trust statute of 1895 being itself void, can not be invoked to defeat an action of damages for breach of a contract on the ground that the contract is in violation of such statute.

**4.—Same—Contract Made Subject to Approval of Principal.**

Where in an action for breach of a contract to sell certain machinery, executed for the seller by an agent, there was pleading and evidence to the effect that the agent signed the contract upon the understanding that it was to be submitted to and approved by the seller before taking effect, it was error for the court to refuse to submit that issue to the jury.

Appeal from the District Court of Palo Pinto. Tried below before Hon. W. J. Oxford.

*Orick & Terrell* and *W. P. Gibbs*, for appellant.

*Crudgington & Penix*, *McConnell & Smith*, and *Theodore Mack*, for appellee.

**SPEER, ASSOCIATE JUSTICE.**—Appellee sued appellant to recover damages for its failure to fulfill a contract to furnish him with certain ice-making machinery, by reason of which breach he lost the profits upon sales of ice, which profits it was alleged were known to, and in the contemplation of, the parties at the time of entering into the contract for the machinery.

We think there is no merit in the first and second assignments of error, which attack the sufficiency of the contract because of the failure of the wife of appellee to sign and acknowledge the same. While it is true that before a lien can be created upon a homestead for improvements to be erected thereon the wife must sign and properly acknowledge the lien as provided by law, nevertheless we think that principle has nothing to do with this case. The contract between appellant and appellee wherein the latter undertook and agreed to give to the former a mechanic's lien upon the premises whereon the machinery was to be situated may be a perfectly valid contract, although he may in fact be



unable to comply with his undertaking. For his failure in this respect he might be liable to appellant for the damages. The contract under consideration did not purport to create the lien, but contemplated a lien to be executed in the future, and presumably prior to the erection of the improvements. This lien when executed would require the wife's signature, but her signature and acknowledgement of the present contract would have imparted no additional validity whatever to it, in truth would not have been binding upon her at all; it would have been in the nature of a contract to execute a conveyance of or mortgage upon the homestead, which is unenforceable against a married woman.

We are also of opinion the allegations and proof were sufficient to raise the issue that the lost profits of appellee from the sales of ice which he would have made form a proper element of damages to be recovered in this case. Ordinarily, to be sure, lost profits or other special damages of whatever character will not form the measure of damages for breach of contract, but where such profits are shown to be within the contemplation of the parties, and shown to be the direct result of the breach of contract, they are recoverable. *Alamo Mills C. v. Hercules Iron Works*, 1 Texas Civ. App., 683, 22 S. W. Rep., 1099; *Ellis v. Tipps*, 16 Texas Civ. App., 82, 40 S. W. Rep., 524; *Anderson Elec. L. Co. v. Cleburne Water L. and L. Co.*, 44 S. W. Rep., 931; *Plano Manfg. Co. v. Cooper*, No. 4210, decided by this court (memorandum opinion) on May 30, 1903.

Neither can we sustain the assignment complaining that the contract between appellee and Green, the person to whom appellee had contracted the output of ice, promising to him the profits sought to be recovered in this case, was in violation of the anti-trust statute, and therefore void. The statute in force at the time of the making of this contract (1895) being itself void, the contract is not forbidden. *Connelly v. Sewer Pipe Co.*, 184 U. S., 679; *State v. Shippers Compress Co.*, 95 Texas, 603; *Gammel Book Co., v. McCarty*, by this court, unreported.

The court did err, however, in refusing to submit to the jury special charge number 3 requested by appellant. This charge sought to submit an issue not otherwise embraced in the charges given, and was as follows: "You are instructed if you believe from the evidence that the proposition sent in duplicate, one to Maddox and the other to Galbraith, by the Fred W. Wolf Company, was changed and other matters were inserted in same after same was received by Maddox and Galbraith, and that the said Maddox signed same with the understanding that said proposition as changed should be returned to the Fred W. Wolf Company for its approval, then you are instructed to find for the defendant." This issue was distinctly pleaded and as distinctly raised by the testimony of appellant's agent, Maddox, as well also by the attorney who wrote the proposition of contract. Even though the agent, Maddox, had the authority, as the jury found he had, to make the con-



tract with appellee, yet if it be true that he did not make the contract, but only signed the same with the understanding that the changed proposition should be submitted to his principal before it should be binding as a contract, clearly appellant would not be bound in the absence of an approval, which the undisputed evidence shows has never taken place. This, as before stated, was an issue in the case, which the jury was not permitted to pass upon. This error requires a reversal of the case.

*Reversed and remanded.*



## J. T. SMITHERS V. T. SMITH ET AL.

Decided April 16, 1904.

**1.—Reconvention in Trespass to Try Title—Affirmative Relief—Nonsuit.**

Plaintiff sued in trespass to try title to recover surveys 91 and 27, described by metes and bounds, the trouble growing out of a conflict of these surveys with surveys 90 and 28, claimed by defendants, who reconvened in the suit, asserting title to the latter surveys, described by metes and bounds different from those of plaintiff's surveys, and that plaintiff's claim was a cloud on their title, with prayer for affirmative relief. Plaintiff having taken a nonsuit, the case was tried, over his objections, on the cross-pleas of the defendants. Held, that defendants were entitled under their pleadings to the relief asked, and that such relief could not have been had under their defensive pleadings to plaintiff's suit.

**2.—Same—Citation on Cross-Plea—Appearance—Waiver.**

Plaintiff having appeared and answered in the trial of the cross-action by defendants, it did not affect the jurisdiction of the court to render judgment that he was not served with citation on the filing of the cross-pleas.

**3.—Same—Removal of Cause to Federal Court.**

Plaintiff, a nonresident, having brought his action in a State court, thereby submitted himself to its jurisdiction to its whole extent, as determined by the State statutes, and did not, by reason of defendants' pleas in reconvention, become a defendant so as to be entitled to remove the cause to a Federal court. Following *Waco Hardware Co. v. Michigan Stove Co.*, 91 Fed. Rep., 289.

Appeal from the District Court of Floyd. Tried below before Hon. J. A. P. Dickson.

*Matlock, Miller & Dycus*, for appellant.

*Wilson & Kinder* and *Hunter & Flood*, for appellees.

**SPEER, ASSOCIATE JUSTICE.**—J. T. Smithers, a resident of the State of New York, sued a number of defendants, among whom were appellees Smith and Greer, in trespass to try title to recover certain surveys of land numbers 91 and 27, in Floyd County. The defendants Smith and Greer answered by general denial, plea of not guilty, and by special answer hereafter to be noticed. After said answers were filed the appellant, Smithers, dismissed his suit against each and all of the defendants at his own cost, and on the same day the court made an order sustaining his motion to dismiss, but holding the cause over for trial on appellees' cross-action interposed by the special answer referred to. On the same day, and after the dismissal of his cause of action, appellant filed his petition for the removal of the cause of action asserted by appellees against him to the Circuit Court of the United States for the Northern District of Texas, tendering at the time a proper bond. On the next day the court made an order denying the motion of appellant to remove the cause to the Federal Court. On the day the last mentioned order was made the following judgment was rendered in the case: "Be it remembered that on this day this cause came on to be heard by the court, and the plaintiff appeared by counsel, and the defendants, T. Smith and S. A. Greer, having answered separately, appeared by their



counsel, as well as in person, and the plaintiff J. T. Smithers, having taken a nonsuit, said cause was held over for trial upon the plea in reconvention filed by each of the defendants, wherein they allege title to the land, and pray that they be quieted in their title, and that the cloud be removed from their title to said lands. Whereupon said cause came on to be heard by the court, and the defendants appearing by counsel and in their own person, and the plaintiff having filed no answer in said cause, the court is of the opinion that the defendants should recover of and from the plaintiff the lands as set out in their pleas. That is, the defendant T. Smith should have and recover of and from the plaintiff, J. T. Smithers, the premises described and bounded as follows: The following described survey of land, situated in Floyd County, Texas, known as survey No. 28, block G., located by virtue of certificate No. 30-371, originally granted to the T. & N. O. Ry. Co., and more fully described as beginning at a stake in earth mound, marked by 4 pits, 1900.8 vrs. east of a stone set in ground, marked by 2 pits, about 25 vrs. N. W. of Sand Hill schoolhouse, established by H. C. Knight, surveyor of Crosby land district, for N. W. corner of survey No. 29, same block, the same being the S. W. corner of section No. 30, same block, for the N. W. corner of this survey. Thence east 1872 vrs. to stake and mound, marked by 4 pits, in south line of section No. 31, same block, for N. E. corner of this survey. Thence south 1900.8 vrs. to a stone in ground for S. E. corner of this survey. Thence west 1872 vrs. to a stone on north bank of Running Water Draw, for S. E. corner of survey No. 29, same block, and S. W. corner of this survey. Thence north 1900.8 vrs. to the place of beginning, containing 600 acres of land. It is further ordered, adjudged and decreed by the court that the said T. Smith be quieted in his title to said land, and the cloud be removed therefrom, and that he may have his writ of possession. It is further ordered, adjudged and decreed by the court that the defendant S. A. Greer do have and recover of and from the plaintiff, J. T. Smithers, the premises described as follows: Described as survey No. 90, block G., located by virtue of certificate No. 733, originally granted to the T. T. Ry. Co., and situated in Floyd County, Texas, and more fully described as beginning at a stone on north bank of Running Water Draw, for the N. W. corner of this survey, the said corner being 1900.8 vrs. east and 1900.8 vrs. south of a stone set in ground, marked by 2 pits, about 25 vrs. N. W. of Sand Hill schoolhouse, established by H. C. Knight, surveyor of Crosby land district, for N. W. corner of survey No. 29, same block. Thence east 1872 vrs. to a stone set for the S. E. corner a 600-acre survey made for T. Smith, out of section 28, same block, for N. E. corner of this survey. Thence south 1900.8 vrs. to a stone on south side of Running Water Draw, for S. E. of this survey. Thence west 1872 vrs. to a stone set for S. W. corner of this survey. Thence north 1900.8 vrs. to the place of beginning, containing 600 acres of land. It is further ordered, adjudged and decreed by the court that said defendant S. A. Greer be quieted in his title to said land as above described, and that the cloud



be removed from his title to the same, and that he have his writ of possession. It is ordered, adjudged and decreed by the court that the defendants, T. Smith and S. A. Greer, do have and recover of and from the said plaintiff, J. T. Smithers, all the costs in this behalf expended, for which let execution issue."

The special answers of appellees, while separately made, were substantially the same, and were as follows: "And the defendant T. Smith, for further answer in this behalf, comes now by his attorneys, and by way of cross-action says: That on the first day of January, 1900, he was lawfully seized and possessed of the tract of land hereinafter described, holding the same in fee simple, said land being situate in Floyd County, Texas. That on the day and year last aforesaid, plaintiff unlawfully entered upon said premises and ejected the defendant therefrom, and unlawfully withholds from the defendant the possession thereof, to his damage \$450. That the premises so entered upon and unlawfully withheld from the defendant are described as follows: School section No. 28, in block G, issued to the T. & N. O. R. R. Co., containing 640 acres of land. Plaintiff has taken possession of said land, and now holds and claims the same by virtue of a superior title thereto, claiming their title by a supposed conflict in the tract of land as described in their petition, with the land as hereinbefore described and owned by the defendant, and have in various ways and on divers occasions attempted to slander and cast a cloud on defendant's title to said land, as hereinbefore described, and the plaintiffs are claiming and holding out a superior title thereto. Wherefore defendant T. Smith prays that the cloud be removed from his title, and that he be quieted in the possession thereto, and that upon final trial he have judgment for the restitution and possession of the above described premises, and for his damages and costs of suit." In appellee Greer's answer he asserted title to school section No. 90 in the same manner that appellee Smith asserted title to survey No. 28, this being the principal difference between the answers of the two appellees.

We think these answers constituted an affirmative demand for relief against appellant; relief, too, which could not have been given appellees under their defensive pleading to the appellant's suit, since it will be seen that appellant's suit put in controversy the title to sections 27 and 91, whereas, in the answers quoted, sections 90 and 28 are in controversy,—apparently other and different lands. The principle announced in *Hoodless v. Winter*, 80 Texas, 638, therefore has no application in this instance. The pleas of appellees appear to be sufficient as affirmative pleas to support an action of trespass to try title.

Appellant's fourth assignment, however, presents error, but one which does not necessarily require the reversal of the case, since the error can be cured here by a reformation of the judgment. The assignment under consideration calls in question the sufficiency of appellees' pleading to support the judgment rendered by the court in their favor. It is of course elementary that the judgment must correspond with the pleadings



in the case, and that the court has no authority to consider and render judgment upon an issue not made by the pleadings. In this case, in the light of the allegations of appellees' special pleas, the real issue between them and appellant was the title to, and right of possession of, sections 90 and 28. This issue appellant did not see fit to controvert. By his failure to answer he admits appellees' right to recover the title and possession of the lands described as against him. There is no issue made in the pleadings, nor could there be upon the trial of the case, of the location of these lands upon the ground; this was not thought to be material at the time appellees tendered the issues to appellant, or at least was not pleaded by them. The court therefore had no authority to render judgment upon an issue not made by the pleadings. *Roche v. Lovell*, 74 Texas, 191; *Stephens v. Motl*, 81 Texas, 121; *Warren v. Fredericks*, 83 Texas, 385; *Converse v. Langshaw*, 81 Texas, 276; *Hamilton v. Battle, Dallam*, 575; *Schmidt v. Mackey*, 31 Texas, 662; *Stephenson v. Bassett*, 51 Texas, 544; *Mims v. Mitchell*, 1 Texas, 454; *Menard v. Sydnor*, 29 Texas, 260; *Black on Judg.*, sec. 242. The judgment will therefore be reformed so as to correspond with the allegations of appellees' special answers, and as thus reformed will be affirmed.

We, of course, in affirming the judgment, rule against appellant upon his contention that he should have been cited to appear and answer appellees' cross-pleas. While under the rule as announced in *Harris v. Schlinke*, 95 Texas, 98, judgment could not have been rendered against him without showing either that he had been served by citation or made an appearance in the case, yet we think the recitations of the judgment sufficient to show that appellant actually appeared in such way as to waive the issuance of such notice, and to submit himself to the jurisdiction of the district court. The object of a citation is to give notice of the pendency of the suit; this purpose is fully subserved when a defendant enters his appearance in the case. The service of a citation is not then an essential to the court's power to render judgment.

It of course also follows that we are of opinion the trial court committed no error in refusing the application for the removal of this case to the Circuit Court of the United States for the Northern District of Texas. See *Waco Hardware Co. v. Michigan Stove Co.*, 91 Fed. Rep., 289; *West v. Aurora City*, 6 Wall., 139; *La Montague v. Harvey Lumber Co.*, 44 Fed. Rep., 645.

*Reformed and affirmed.*

Application for writ of error dismissed for want of jurisdiction.



CHARLES H. BABCOCK, ADMINISTRATOR, V. GEORGE C.  
WOLFFARTH ET AL.

Decided April 18, 1904.

**1.—Judgment by Default—Collateral Attack—Service by Publication.**

Where a judgment by default in a suit by publication contained no recitals as to service on the defendant it was subject to collateral attack because of noncompliance of the citation or notice with the requirements of the statute.

**2.—Same—Citation by Publication.**

Where a citation for publication was issued prior to the taking effect of a statute in relation to such process, but was not published until after the statute had taken effect, its sufficiency was to be determined by the provision of such statute.

**3.—Same—Sufficiency of Citation.**

Under the statute (Acts 1897, p. 138) requiring that a citation to unknown defendants in a tax suit shall run in the name of the State and county, and shall be "directed to all persons owning or having or claiming any interest" in the land in suit, a citation running in the name of the State only and directed to the sheriff, commanding him to summon "unknown owner whose residence is unknown" to appear and answer, is substantially defective and a judgment based thereon is void.

Appeal from the District Court of Lubbock. Tried below before Hon. J. M. Morgan.

*R. P. Smythe, H. C. Randolph, and Tarlton & Ayres*, for appellant.

*Kinder & Dalton and Hunter & Flood*, for appellees.

SPEER, ASSOCIATE JUSTICE.—Appellant sued appellees to recover a section of land in Lubbock County, and is entitled to judgment unless he is precluded by a judgment of the District Court of that county in a tax suit instituted by the State against the unknown owners of the land, which judgment he attacks as being void. Whether or not the judgment is void depends upon the sufficiency of the following notice issued in the tax suit:

"The State of Texas, to the Sheriff or any Constable of Lubbock County, Greeting: You are hereby commanded that by making publication of this citation in some newspaper in the county of Lubbock, if there be a newspaper published in said county (but if not then in the nearest county where a newspaper is published), for four weeks previous to the return day hereof, you summon unknown owner whose residence is unknown to be and appear before the honorable District Court of Lubbock County, Texas, at the next regular term thereof, to be holden at the courthouse in the town of Lubbock on the seventh Monday after the first Monday in August, 1897, same being the 20th day of September, 1897, then and there to answer the plaintiff's petition filed in a suit in said court on the 24th day of July, 1897, wherein the State of Texas is plaintiff and unknown owner is defendant; file number of said suit being No. 82. The nature of the plaintiff's demand is as follows, to wit:



That the defendant was the owner and in possession of 640 acres of the following survey of land in said Lubbock County, Texas, being survey No. 27, abstract No. 174, and certificate No. 1249, original grantee E. L. & R. R. R. Co., and which land is definitely described in plaintiff's original petition.

"That in the year 1896 there was levied and assessed against the land above mentioned certain State and county taxes for said year, amounting in the aggregate to the sum of (\$10.80) ten and 80-100 dollars.

"That said land has been returned delinquent for the year 1896 by the tax collector of said county, as shown by the 'County Clerk's Delinquent Tax Record,' and the commissioners court of said county has caused such delinquency to be published as required by law and has caused suit to be filed thereon to enforce the collection of such taxes, interest and cost.

"Plaintiff prays for judgment for the amount above specified, and in default thereof the said land be sold to satisfy said judgment for taxes, interest and costs, and for such relief to which plaintiff may be entitled under the law and the facts, and the further sum of (\$5.00) five dollars as attorneys fees and 25 cents as publisher's fees.

"Herein fail not, and have you then and there before said court this writ, with your indorsement thereon showing how you have executed the same.

"Witness George C. Wolfarth, Clerk of the District Court of Lubbock County. Given under my hand and seal of said court at office in Lubbock, this 16th day of August, 1897. (Seal) George C. Wolfarth, Clerk District Court, Lubbock County, Texas.

"Came to hand this the 17th day of August, 1897, at 10 o'clock p. m., and executed by publishing the same in the Texas Press Leader, a newspaper published in the county of Lubbock, State of Texas, once each week previous to the return day thereof. Said publication having been made on the 21 days of August, 1897, and the days of August 28 day and September 4 day and Sept. 11, 1897, and I herewith return a printed copy of said publication. Returned Sept. 18, 1897. J. B. Legett, Sheriff, Lubbock Co., Texas."

There is no recitation of service whatever in the judgment, and the record in the tax suit sufficiently shows that the citation set out is the basis of the judgment rendered. This judgment may therefore be collaterally attacked, since the attack in no way involves a contradiction of the record. The notice was issued prior to the going into effect of the present statute prescribing the requisites of notice in tax suits, but was published subsequently thereto. The present statute having repealed all laws in conflict with its provisions, and having no saving clause with respect to suits then pending, we think the notice must be tested by its requirements. By an examination of this act (Acts 1897, p. 138, sec. 15) it will be seen that the first prescribed requisite is that the notice shall be in "the name of the State and county;" in this respect the notice



here under consideration is at fault, running only in the name of the State. Next it is prescribed that such notice shall be "directed to all persons owning or having or claiming any interest," etc., in the land. Here again the present notice is defective. It is directed "To the sheriff or any constable of Lubbock County, greeting," which officer is commanded to summon "Unknown owners whose residence is unknown," etc. We think these defects, being substantial, are fatal to the notice, and render the judgment based thereon void. *Earnest v. Glaser*, 32 Texas Civ. App., 378, 74 S. W. Rep., 605; *Netzorg v. Geren*, 26 Texas Civ. App., 119, 62 S. W. Rep., 789. Moreover, it is doubtful if the notice sufficiently apprises the interested persons that a foreclosure of a tax lien in favor of the State is sought in this suit. *Netzorg v. Geren*, supra. But upon this question it is unnecessary for us to express an opinion.

The judgment of the District Court is reversed, and judgment is here rendered for appellant for the land sued for.

*Reversed and rendered.*

Writ of error refused.



## MRS. S. P. MATTHEWS, NEXT FRIEND, v. E. EPPSTEIN &amp; Co.

Decided April 16, 1904.

**1.—Fraudulent Conveyance—Evidence—Disparagement of Title.**

Where a creditor had subjected to his claim certain land the title to which was in the name of J. D., the debtor, and suit was brought therefor on behalf of a minor son of the debtor, having the same name as the father, upon the claim that the minor was the person named and intended in the deed of the land, evidence of declarations by the father to the effect that the property was his, and that he wished it put out of the way of his creditors, was admissible and could not be excluded on the ground that such declarations were in disparagement of the son's title,—the material issue being as to the identity of the grantee in such deed.

Appeal from the District Court of Montague. Tried below before Hon. D. E. Barrett.

*W. T. Russell* and *C. M. Templeton*, for appellant.

*J. M. Chambers* and *Etheridge & Baker*, for appellee.

CONNER, CHIEF JUSTICE.—Appellant, as next friend of J. M. Dickson, Jr., a minor, instituted this suit against appellee to recover lot 20, in block 15, in the town of Nocona, Montague County. Appellees claim by virtue of a regular judgment, execution sale, and sheriff's deed, against J. M. Dickson, the father of said minor. Appellant, who was the grandmother of J. M. Dickson, Jr., claimed by virtue of a deed from one D. C. Hart to J. M. Dickson, and testimony to the effect that the J. M. Dickson named as grantee in the deed was intended as said minor, or that, if intended as J. M. Dickson, Sr., the father of the minor, that it was held by the father in trust for his said son. Appellant Matthews testified that in January, 1901, she gave to J. M. Dickson, Sr., \$500 in cash, to be invested as he thought best for the interest of her said grandchild, and that the property in controversy was bought with part of said money. The testimony of J. M. Dickson, Sr., was to the effect that his minor son was born September 29, 1900; that in January, 1901, he bought the property in question with the money given to him by his son's said grandmother, directing that the deed should be made in the name of the minor, but that the transaction was closed over the telephone from Nocona to Chickasha, I. T., where Hart resided, and that when the deed was received, about January 8, 1901, he found that it had been made without any designation indicating that the grantee was the son rather than himself, and that because of this fact he did not have the deed recorded. Hart's agent in the town of Nocona, however, who closed the transaction, and who did the talking over the telephone, testified that he had no recollection that at the time the trade was closed J. M. Dickson, Sr., told him the purchase was for his son, or directed him to have the deed made to the son, but said that he called up Hart at Chickasha and told him that he had sold the property to J. M. Dickson, who it appears was well known to Hart, and that within a few



days the deed came, and that he took it to J. M. Dickson, who read it over, paid the balance of the purchase money and made no complaint about it at the time, as to the name or in any other particular.

The judgment was in favor of the appellees, and the sole material question presented on this appeal relates to appellant's objections to the following further evidence offered in behalf of appellees, to wit: One C. N. McNew testified that at the time of the sale of the property in question he was renting the property from Hart, and thereafter rented from J. M. Dickson, Sr., paying him the rent therefor. That a few days after the sale J. M. Dickson, Sr., told the witness that he wanted him to vacate the premises; that he was going to open up a grocery store in the house situated on the lot, but J. M. Dickson having abandoned such purpose, he thereafter continued to rent the lot from him. That J. M. Dickson, Sr., did not tell the witness that the property belonged to his said son. George S. March testified that some time after the sale of the property in question J. M. Dickson, Sr., came to the witness in Nocona and stated that he had been sued in the County Court of Montague County by one Alice Holt, upon a liquor dealer's bond, and that he wanted him (the witness) to sell the property before the Holt suit was tried. The court papers in said suit were also introduced in evidence.

It is insisted that the testimony referred to is irrelevant and immaterial and inadmissible as against the minor; that the acts and declarations of the witness J. M. Dickson, Sr., can not be received in disparagement of the minor's title. Ordinarily the objections made would be undoubtedly well taken, but the material issue before the court was as to the identity of the grantee in the Hart deed. The testimony of Hart was not offered, and we think the testimony to which appellant objected was admissible on the issue of such identity. Had it been first shown that the conveyance was intended to be to the minor son, then the acts and declarations of the father would have been inadmissible to disprove the title conveyed. The real question, however, in this suit was, who was the grantee in fact, J. M. Dickson, Sr., or J. M. Dickson, Jr.? And in the ascertainment of this fact the acts and declarations of the parties at the time and illustrative thereof were admissible. See *Hickman v. Gillum*, 66 Texas, 314; *McCamant v. Roberts*, 80 Texas, 316; *Nix v. Cole*, 29 S. W. Rep., 562; *Schott v. Pellerim*, 43 S. W. Rep., 945; *Nehring v. McMurrian*, 94 Texas, 51.

No other question having been presented, and the evidence being in our opinion sufficient to sustain the judgment, it is ordered that it be affirmed.

*Affirmed.*

Speer, Associate Justice, did not sit in this case.

Writ of error refused.



HERMAN SEGAL V. ST. LOUIS SOUTHWESTERN  
RAILWAY COMPANY.

Decided April 16, 1904.

**Carrier of Passengers—Assault on Lady Passenger.**

While plaintiff's wife was traveling in a lighted passenger car at night it stopped at a regular station for a short period, during which time, the employes being temporarily absent from the car, a negro entered the car from the outside and finding plaintiff's wife alone in the car and asleep made an assault on her. Held, that the railway company was not liable therefor, since the assault was, under the circumstances, so unreasonable and out of the ordinary that it could not have been contemplated by a prudent person.

Appeal from the District Court of Hopkins. Tried below before Hon. H. C. Connor.

*Todd & Armistead, H. L. Norwood, Scott & Head, and V. M. Clark,* for appellant.

*E. B. Perkins, Glass, Estes, & King, and Templeton, Crosby & Dinmore,* for appellee.

RAINEY, CHIEF JUSTICE.—The following, taken from appellant's brief, states the nature and result of the suit, viz.: "This suit was instituted by appellant, Herman Segal, to recover damages for personal injuries inflicted upon his wife, Yetta Segal, by reason of an assault committed upon her person while she was a passenger on defendant's train. The defendant pleaded general demurrer and general denial. The general demurrer was presented and overruled by the court. After all plaintiff's testimony was introduced, defendant moved the court to direct a verdict for defendant, which motion was granted and the jury instructed to render a verdict for defendant. Plaintiff appeals, and assigns as error this action of the court."

The evidence on the part of plaintiff showed the following facts: The plaintiff's wife, a white lady, on March 9, 1902, was a passenger on defendant's train from Dallas to Texarkana, occupying a first-class reclining chair car, reserved exclusively for white passengers. She was accompanied by her little daughter, about 4 years old. The train was a night train. At Sulphur Springs the last of the other passengers on the car left the train, and she and her little daughter were left the only remaining passengers in the car. The railway porter or brakeman arranged the reclining chair for her to sleep, and she went to sleep. When the train stopped at Naples, about 5 o'clock in the morning, then before daylight, she was awakened by being seized by the throat and her skirts lifted up. Her assailant was a young negro man. He choked her so that she could not make an outcry, but she struggled with and resisted him until the train started, when he desisted and fled. She was entirely alone in the car, and defendant's employes knew this; yet



they had all left the car before or at the station, and left the doors of the car open or unlocked. The negro had entered through one of the doors and escaped from the door.

The following testimony given by plaintiff's wife shows substantially all that occurred, viz.: "The first thing I knew, I was awakened by a ducky and he was choking me and my skirts were up. That was the first thing I knew, being waked by him and his fingers against my throat, and I had to struggle with him to get him off. I have no idea how long that continued, but still I know my struggle was fierce to keep him off. I had to use all my strength to keep him off and a great deal more. I was defending myself against a brute. He left the coach as the train was beginning to move, and I started to the back of the coach and I met the brakeman, and when I was able to explain to him what happened, he did all he could for me and got me some water and bathed my head with cool water, and he asked me to give him a description of the ducky, which I did, and he said he thought he knew who it was. And then the conductor came in and I told him. I refused to stay in the coach any longer by myself, so he brought in a lady and gentleman to stay with me until we got to Texarkana." That she saw and identified her assailant at Naples two or three days after that time. As soon as the train started to move the negro got out of the car. He got off. "I did not see him on the car prior to the time I woke up. This assault must have been just before 5 o'clock a. m. I can not tell whether it was before 5 o'clock or afterwards. It was not daylight. It was really dark. He started to run out of the car as soon as the train started to move. I was asleep when the train reached Naples. I did not know when the train started. The train was standing still when I woke. When I woke up the negro had his hands on my throat. I do not know which hand he had on my throat. He was choking me. He had his two thumbs pressing up against my tonsils. When I woke up he had his two hands up against my tonsils, pressing against them. I am positive of that as I am of anything I have testified to to-day. The next thing he did was to try to choke me insensible. He did not take his thumbs away from my throat until the train started. My skirts were raised before I ever knew it. I do not know when he raised my skirts. When he took his two thumbs away from my throat I do not know that he did anything. He was trying to choke me insensible when I woke up, and my skirts were raised and he was choking me. He took his thumbs away when the train started to move. When he took his thumbs away from my throat and the train started to move he started to run. Immediately he took his two thumbs away from my throat he ran. He was pressing his thumbs up against my throat so hard that I could not scream. I did not call out or make any noise because he pressed my throat so hard that I could not. His hands pressing on my throat is what woke me up. I did not wake up when he raised my skirts that I know of. I might have been half awake, but was not awake enough to know what was going on. When I did wake up he had both hands up to my



throat. He pressed hard enough to cut off my breath. It did not hurt my throat enough to cause me pain. Afterwards it was just sore on the inside. At the time he was pressing against my throat it did hurt me. I did not stop to examine whether or not it left any sign on the outside, because I was too frightened. There was no sign on my throat. At the time the negro assaulted me he either had on rubber shoes or was in his sock feet, and as soon as he left the car I did not jump up because I could not. It was a few minutes before I could get up. I was too badly frightened to notice how long it was. When I did get up I started back to the rear end of the coach and met the brakeman coming in from the rear car from the outside. He was on the outside when I first saw him and he walked on in the coach where I was and I told him what had happened, and he got me a drink of water and wet his handkerchief for me and did all he could for me after I told him what had happened. I do not know on which side the negro come in the coach, for I was asleep when he come in. He went out towards the front end of the car towards the engine. I could not form any idea how far the train had moved before I saw the brakeman. The negro that assaulted me did not stop in the car, but ran out of the car door. He went out of the car door, for it was open, and he disappeared from my sight and I did not see him any more until I saw him at Naples, on the third day after that. The brakeman brought the train porter in, in order that I might see if he was the one that assaulted me. I did see the train porter before getting to Texarkana. I do not know whether he was a very black negro or not. I know he was not the one that assaulted me.

The testimony further shows that aside from the terror and humiliation produced, that serious and permanent physical injuries resulted to her.

The only question presented is whether or not the facts authorized the trial court in instructing a verdict for defendant. We think that this should be answered in the affirmative. "The duty of the carrier to protect passengers from the assaults and insults of third persons arises only when the threatened wrong occurs in the presence or within the knowledge of its agents, or when, from the facts and circumstances attending or preceding the injury, the carrier might have foreseen and prevented it." *Prokop v. Railway Co.*, 34 Texas Civ. App., —, and authorities there cited. No employe of appellant was present when the assault was committed upon plaintiff's wife, nor do the facts show any such condition existing at the time from which said employes ought reasonably to have anticipated or foreseen the assault and guarded against it. The *Prokop* case, cited above, in which a writ of error was refused by the Supreme Court, is decisive of the question here presented. If any difference it is a stronger case against the company than this. In that case the plaintiff's wife had entered the company's depot to take passage on its train. The train was late, night came, and the company's employes failed to light the waiting-room and they left



the depot, and while plaintiff's wife was there alone in the dark she was assaulted.

It was held no recovery could be had. In this case plaintiff's wife was on appellant's train, in a lighted car. It stopped at a regular passenger station for a short period, when the assault was committed. The company's employes were not in the coach, and their absence at this time can not be considered such negligence as would warrant a recovery. That an assault would be made under such circumstances was so unreasonable and out of the ordinary that it could not have been contemplated by a prudent person.

It is insisted by appellant that under article 4509, Revised Statutes, it was negligence per se for appellee to have permitted the negro to enter the coach and remain there the time he did.

This contention we think untenable. Under the facts we can see no possible bearing that said statute can have on this case.

The judgment is affirmed.

*Affirmed.*



## TEXAS &amp; PACIFIC RAILWAY COMPANY v. T. M. WHITE.

Decided April 16, 1904.

**1.—Carriers of Live Stock—Overloading—Pleading.**

Where, in an action against a carrier for injury to live stock shipped under a contract by the terms of which plaintiff, the shipper, assumed the risks of danger from overloading, the defendant pleaded that the cars were overloaded, no pleading on the part of plaintiff was necessary to rebut that defense and to warrant a charge submitting that issue.

**2.—Same—Value at Destination.**

Where horses are shipped on a through contract over connecting lines, and suit is brought against the initial line for injury occurring during the shipment, the fact that the contract limits the liability of the defendant to injury occurring on its own line does not make the value of the horses at the last point on defendant's line the measure of damages, but such measure is their value at the point of destination, and it is immaterial whether or not defendant had notice that they were intended for sale at the point of destination.

**3.—Same—Evidence of Value—Good Condition.**

Where plaintiff's witness testified as to the value of the horses at their destination, had they arrived in good condition, his testimony was not an opinion and subject to objection on the ground that he did not define what he understood "good condition" to be, since defendant, if he deemed that term not sufficiently explicit, could have, by cross-examination, ascertained what the witness meant thereby.

Appeal from the District Court of Fannin. Tried below before Hon. Ben H. Denton.

*T. J. Freeman and Head & Dillard*, for appellant.

*Gross & Gross*, for appellee.

RAINEY, CHIEF JUSTICE.—Appellee sued the railway company to recover damages to horses shipped from Colorado, Texas, to Florence, Ala. Judgment was rendered for appellee, and the railway company appeals.

The evidence shows that plaintiff delivered to the railway company, at Colorado, Texas, for shipment to Florence, Ala., said horses. A contract was there entered into which stipulated that the railway company should not be bound beyond its terminus, which was Memphis, Tenn.; that plaintiff should at his own risk and expense load, unload, etc.; that he assumed all risk of unloading cars, fright of animals or crowding one upon another, and "that in all cases when said first party (railway company) shall furnish for the accommodation of said second party (plaintiff) laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders and deemed his employees while so engaged, and he hereby agrees to hold said party harmless on account of their acts." One of the cars furnished was unfit for the transportation of stock, by reason of which and the negligent handling of the train said horses were damaged on appellant's line in an amount equal to the sum assessed by the verdict of the jury.



One paragraph of the court's charge was: "If you believe from the evidence that plaintiff caused defendant's employes to overload said cars, if they were overloaded, and that such overloading, if any, of said cars caused any part of the damage to plaintiff's horses, if any, you will find a verdict for defendant as to such damage, if any, so caused by such overloading, if any, of said cars; but on the other hand, if you believe from the evidence that plaintiff did not cause defendant's employes to overload said cars, if they were overloaded, then defendant would be liable for the damage, if any, resulting to plaintiff's horses from such overloading, if any."

Appellant complains of the latter part of this charge wherein the jury are instructed that if plaintiff did not cause defendant's employes to overload said cars, defendant would be liable for the damages resulting from such overloading; the contention of appellant being, in effect, that plaintiff, by his contract, assumed the risk of overloading, and in order to place liability on defendant it was necessary to plead such facts as would relieve him from his contract. The appellant plead that the cars were overloaded, etc.

Plaintiff's testimony is to the effect that he was not present when the cars were loaded, which was done without his instructions, and the effect of his testimony is that the injury to the horses was occasioned by the defective car and rough handling of the train. The issue of overloading having been presented by the appellant, we think no pleading was necessary on the part of plaintiff to rebut appellant's defense, and therefore there is no error in the charge complained of.

There was no error in the court charging that the measure of plaintiff's damages would be the value of his horses at the place of their destination for those that were killed, and the difference in such value for those that were injured, and in not confining the value to Memphis, defendant's terminal. The final destination of the horses was Florence, Ala., and they were so billed. Defendant undertook to transport them to its terminal and there deliver them to its connecting carrier for delivery at Florence. While the defendant, under the contract, could not be held liable for damages occurring on the other road, yet in a case like this the value at the point of final destination controls. *Reeves v. Railway Co.*, 11 Texas Civ. App., 514, 15 Texas Civ. App., 157, 32 S. W. Rep., 920; *New York L. E. & W. Railway Co. v. Estill*, 147 U. S., 591, at p. 616; *Missouri Pac. Ry. Co. v. Fagan*, 72 Texas, 127.

Whether or not appellant had notice that said horses were intended for sale at Florence, the point of destination, is immaterial. The measure of damages is the same whatever intention was entertained for their disposition. *Gulf C. & S. F. Ry. Co. v. Stanley*, 89 Texas, 42, 33 S. W. Rep., 109; *Railway Co. v. Estill*, supra.

Testimony was admitted over the objections of appellant, showing the value of the horses had they arrived in Florence in "good condi-



tion," the objection being that it was "an opinion and conclusion of the witness, and not based upon a sufficient statement of the facts as to what the witness would consider a good or proper condition." It was not error to admit this testimony. The term "good condition" is sufficiently explicit, and if appellant desired to test what the witness meant by the use of said term, it could have done so by cross-examination.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



## WINFIELD SCOTT v. C. C. SLAUGHTER.

Decided April 16, 1904.

**1.—Lease of School Lands—Assignment—Consideration.**

Defendant assigned and transferred to plaintiff a consolidated lease of certain State school lands which was void as to the greater part of the lands because made by the Land Commissioner for a longer period than the unexpired constituent leases. Held, that as the constituent leases remained in force despite their unauthorized cancellation because of the consolidated lease, a plea of failure of consideration for the assignment of the consolidated lease was not tenable, the defendant transferring the actual possession of the lands at the time the lease was assigned.

**2.—Same—Abatement of Price—No Covenants of Warranty.**

The quitclaim by which the assignment and transfer of the lease was made being without covenant of warranty, there could be no abatement of the purchase money for a partial failure of title.

**3.—Same—Assent of Lessor to Assignment of Lease.**

The assignee of the lease could not, in order to avoid his contract, set up the want of the State's consent to the assignment, since that did not render the assignment void, but only voidable, and the State having sought no forfeiture of the lease on that ground, the want of its consent to the assignment was not to be inferred in order to thus practically work a forfeiture of the lessee's rights.

**4.—Same—Contract—Mistake of Law Not Ground for Recovery Back of Price.**

Where money was voluntarily paid under a mutual mistake of law as to the validity of the consolidated lease, such mistake in and of itself afforded no ground for recovering back the money.

Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*Matlock, Miller & Dycus, Muse & Allen, and Capps & Canty*, for appellant.

*K. R. Craig and G. G. Wright*, for appellee.

BOOKHOUT, ASSOCIATE JUSTICE.—This suit was instituted by the appellant in the District Court of the Forty-fourth Judicial District of Texas to recover of appellee amounts aggregating \$20,000, with interest thereon paid to appellee by the appellant on September 25, 1900, for the transfer to appellant by the appellee of the unexpired term of a leasehold estate for ten years from March 1, 1900, of a certain 92,040 acres of public school land in Gaines and Andrews counties in the State of Texas and to cancel a certain promissory note given by appellant to appellee on January 1, 1901, and due January 1, 1903, in part payment for the transfer of said lease, and for \$1325.69, belonging to appellant, which was withdrawn by appellee from the treasury of Texas without the consent of appellant.

The case was tried before the court on May 1, 1903, without the intervention of a jury, upon an agreed statment of facts made out and signed by counsel for the parties in accordance with the provisions of article 1293, Revised Statutes. Upon said agreed statement of facts, judgment was rendered in favor of appellant for the sum of \$1378.71,



being the amount of money belonging to the plaintiff which was withdrawn from the treasury of the State of Texas, with interest thereon from the date of such withdrawal, to wit, September 1, 1902, to the date of trial; and against appellant on his demand against appellee for the sums of money paid for said transfer of lease. Plaintiff appealed. The facts sufficiently appear in the opinion.

*Opinion.*—It is contended by the appellant that the transfer of September 25, 1900, by appellee to appellant, of the unexpired leasehold interest in the lands in controversy, was ineffectual for that purpose, for the reason that said lands were at the time a part of the vacant unappropriated public domain, set apart for the benefit of the public free schools of the State, and could not and did not afford a consideration for the payment or promise of payment of money; and hence the moneys paid to appellee by appellant were paid without consideration. It is admitted that the lands at the time of the transfer to appellant were a part of the public domain of the State of Texas, set apart for the benefit of its public free schools, and consisted of 92,040 acres. These lands, except 9600 acres, were, on the 25th day of April, 1900, held by the appellee under valid lease contracts made with the State, which leases were in good standing. On that day the Commissioner of the General Land Office executed to appellee a lease known as consolidated lease No. 30,561, which comprised all the land embraced in the several constituent leases, and in addition thereto 9600 acres. Upon the execution of the consolidated lease the constituent leases were by agreement of appellee and said Commissioner annulled and canceled. On September 25, 1900, appellee transferred and assigned the consolidated lease No. 30,561 by quitclaim to appellant. The consideration was \$25,000, of which \$5000 was paid in cash and the execution of four promissory notes, each of \$5000, dated January 1, 1902, maturing six, twelve, eighteen and twenty-four months respectively after date and drawing 7 per cent per annum interest. Three of these notes have been paid by appellant. The several constituent leases would by their terms, if the annual rental was paid within sixty days after falling due, have expired on the following dates: The Zinn lease for 30,400 acres, July 12, 1903; lease No. 18,755, for 5100 acres, May 2, 1902; lease No. 20,951, for 8320 acres, November 19, 1902; lease No. 28,007, for 1600 acres, December 27, 1902; lease No. 22,042, for 12,800 acres, January 20, 1903; the Stephens lease No. 24,234, for 22,400 acres, July 2, 1903; lease No. 24,495, for 12,800 acres, July 2, 1903. The lease No. 30,561, called consolidated lease, was an original and valid lease for 9600 acres.

In the case of *Ketner v. Rogan*, 95 Texas, 559, the consolidated lease as to all the land embraced therein, except the 9600 acres, was held void in that the Commissioner of the General Land Office did not have the power to make the same. It is argued that the effect of this holding is that the land included in said consolidated lease, except the 9600 acres, was at the time of the transfer to appellant by appellee



a part of the public domain of the State and did not furnish a subject matter for the payment of the money and notes stipulated in such transfer, and hence falls within the rule announced in *Lamb v. James*, 87 Texas, 485, as construed in *Rayner Cattle Co. v. Bedford*, 91 Texas, 646. In those cases nothing was conveyed by the transfer, all the land attempted to be conveyed being at the time a part of the public domain.

In the instant case, it is admitted that the constituent leases were all in good standing at the date of the consolidated lease, April 25, 1900. The annual rental was three cents per acre, under all the leases, including the consolidated lease. The appellee paid the State the annual rentals to become due under the consolidated lease for a year in advance on the day of its date.

It would seem that the several constituent leases being in good standing, and the rentals under the consolidated lease being the same as the several constituent leases, the payments made on the void consolidated lease should be applied to the constituent leases, thereby keeping them alive and in force. It was thus stated in *Ketner v. Rogan*, that the Commissioner of the General Land Office has no power "to cancel an existing lease, except for the nonpayment of rent." The canceling then of the constituent leases by the Commissioner upon the execution of the consolidated lease was without authority.

Again, it is conceded that at the time of the transfer to appellant the consolidated lease for 9600 acres was valid and in full force. It is further shown that the transfer included "all improvements, consisting of windmills, wells, tanks, troughs, corrals, houses and fences." It is fairly inferable from the facts that appellee was in possession of the lands, and that upon his transfer to appellant possession was delivered to him. Thus it is seen that there was a legal subject matter for the contract. The transfer was not without a valid consideration. The most that can be said is that there has been a partial failure of consideration. The conveyance from Slaughter to Scott is, "all my right, title and interest in and to a certain leasehold," \* \* \* and further expressly states the intention as being "to vest in said Winfield Scott such right, title and interest as I now own." The conveyance being without covenant of warranty, there could be no abatement of the purchase money for a partial failure of title. *Johnson v. Blum*, 28 Texas Civ. App., 10, 66 S. W. Rep., 461; 2 Dev. on Deeds, sec. 957; 3 Wash. on Real Prop., 6 ed., sec. 2239; Tied. on Real Prop., sec. 849; 1 Sug. on Vend., 8 Am. ed., p. 383, sec. 26; 2 Sug. on Vend., 8 Am. ed., p. 193, sec. 6.

It is insisted that the transfer of a lease is void unless the landlord consents to the same. The record fails to show that the Commissioner of the General Land Office consented to the transfer of the lease by Slaughter to Scott. It is not shown that he did not consent, there being no evidence either way on this question. Such being the condition of the record, we are of the opinion that a want of consent should not be inferred, for the purpose of basing a forfeiture of the lease



thereon. The Commissioner of the General Land Office did not claim a forfeiture on this ground. The ground for canceling and annulling the constituent leases was the making of the consolidated lease of April 25, 1900, for a longer period than the unexpired term of the original leases.

Again, the assignment of a lease by a tenant without the assent of the landlord is not void, but voidable at the option of the landlord. He may claim a forfeiture or waive it. *Gulf C. & S. F. Ry. Co. v. Settegast*, 79 Texas, 256; *Wilkey Lodge I. O. O. F. v. City of Paris*, 31 Texas Civ. App., 632, 73 S. W. Rep., 69. The Commissioner of the General Land Office not having claimed a forfeiture of the lease on this ground, the appellant could not set up the want of consent of the State to the transfer to appellant for the purpose of defeating his contract.

Appellant, under his second and third assignments of error, presents the proposition that "money paid with full knowledge of all the facts, but under a clear mistake of law, may be recovered back in an action for money had and received." The case of *Culbreath v. Culbreath*, 7 Ga., 64, 50 Am. Dec., 375, is cited in support of this contention. This case is in point and fairly supports the proposition. We are of opinion, however, that such is not the law in this State. In the case of *Galveston County v. Gorham*, 49 Texas, 303, it was said: "When money is paid under a mutual mistake of law, the mistake of law, in and of itself, is no ground for recovering it back. All persons are equally presumed to know the law, and in such case both parties are equally at fault, and equally innocent of wrong done. To admit ignorance of law to be legally recognized as a fact sufficient in itself to pervert the will of the parties doing the act, so that it should be said and held that the will did not concur with the act done, thereby relieving him from the responsibility for and the consequences of the act, would render the administration of the law impracticable."

In the case of *Pitts v. Elser*, 87 Texas, 347, it is laid down that, "Where money is voluntarily paid with full knowledge of all the facts, it can not be recovered, although it may have been paid upon a void demand, or upon a claim which had no foundation in fact. *Taylor v. Hall*, 71 Texas, 216, 9 S. W. Rep., 141; *Gould v. McFall*, 118 Pa. St., 455, 12 Atl. Rep., 336, 4 Am. St. Rep., 606. This proposition is too well settled to require further citation of authorities." See, also, *Gillam v. Alford*, 69 Texas, 271; *Moreland v. Atchison*, 19 Texas, 308; *Pomeroy's Eq.*, sec. 851.

In the case under discussion there was no fraud or deceit or mistake of fact. At the time of the transfer both parties supposed the consolidated lease, as to the constituent leases, was valid. In this they were mistaken, but such mistake in itself furnishes no ground for recovery by appellant.

Finding no error in the record, the judgment is affirmed.

*Affirmed.*



## J. N. FAGAN v. HERMAN VOGT.

Decided April 18, 1904.

**1.—Lease—Suit for Conversion—Tenants in Common.**

A lease of land providing that three-fourths of the cotton grown and two-thirds of the pecans gathered should go to the lessee, constituted him a tenant in common of such crop with the lessor and entitled him to bring suit at any time after the conversion of the property by the lessor, without waiting until the lease expired.

**2.—Conversion of Crop—Ejectment—Remedy—Lessor and Lessee.**

While the lessee might have brought an action for restoration of possession of the premises upon conversion of the crop and his ejectment by the lessor, his failure to do so can not defeat his right to recover the value of his property unlawfully converted and disposed of by the lessor.

**3.—Charge—General and Special.**

Where the general charge sufficiently presents an issue a special request thereon is properly refused.

**4.—Lessor and Lessee—Tender—Compromise.**

The offer of the lessor, after suit was instituted by the lessee to recover the value of property unlawfully converted, to pay the lessee his portion of the proceeds of the crop and permit him to re-enter upon the premises and gather the remainder of the crop did not amount to a tender but was only an attempt to compromise the suit.

**5.—Conversion—Growing Crops—Cost of Gathering.**

One tenant in common suing to recover for wrongful conversion by another tenant of his interest in a growing crop can not be charged with the cost of gathering such crop.

Appeal from the District Court of Victoria. Tried below before Hon. James C. Wilson.

*Fly & Hill*, for appellant.

*Dupree & Pool*, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellee brought this suit against the appellant, alleging that in the fall of 1901 he rented from appellant for a term of one year, beginning on the 1st of January, 1902, a farm and pecan bottom situate in Victoria County and fully described in the petition; that by the terms of said contract of rent plaintiff was entitled to three-fourths of the cotton grown by him on said rented premises during the year 1902, and two-thirds of the pecans grown on said premises during said year, said pecans to be gathered by plaintiff; that plaintiff took possession of the premises under his contract and cultivated the farm thereon and protected and cared for said pecan bottom until the 9th day of September, 1902, when he was unlawfully and forcibly ejected from said premises by the defendant; that at the time of his unlawful ejection there were six bales of matured cotton in the field ready to be gathered and a large crop of pecans which had not then fully matured; that defendant took possession of said cotton and pecans and gathered the same and has sold a large portion thereof and refuses to account to plaintiff for his interest in same. The value of plaintiff's interest in the cotton and pecans so



unlawfully converted by defendant is alleged to be the sum of \$3600. The prayer of the petition is for a recovery of plaintiff's interest in the property and for partition of such of the property as can be found and the recovery of the value of that portion which has been disposed of by the defendant. The original petition was filed October 20, 1902.

Appellant demurred to said petition, "because the suit could not be maintained before the termination of the lease term." "Because the ungathered crop was not the common property of plaintiff and defendant of which a partition could be had; that if appellee had any remedy, it would be for damages in which the measure of damages would be the market value of the lease at the time of the alleged breach. Because the petition failed to show that appellee had failed to secure other premises on which to gather pecans. Because appellee's remedy was by judicial proceedings to restore to him the possession of the premises. Because the damage as alleged was too remote and speculative." All these demurrers were overruled and appellant answered by denying the contract to have embraced the pecan crop for 1902, but that it was for the pecan crop of 1901 and the cultivation of the land for the year 1902. He also plead breach of contract by appellee in failing to cultivate all of the land as he had agreed to do and asking the rental value of the land not cultivated by appellee.

The trial in the court below by a jury resulted in a verdict and judgment for plaintiff for the sum of \$350.

The evidence sustains the material allegations of the petition, and shows that all of the cotton and pecans taken possession of by the defendant as alleged in the petition were sold by him and the proceeds appropriated to his own use and benefit.

It would serve no useful purpose to discuss the various assignments of error in detail, and we will dispose of the several questions presented by the record without a categorical reference to the assignments.

We think the petition stated a good cause of action and all of defendant's exceptions thereto were properly overruled.

The case of *Tignor v. Toney*, 13 Texas Civ. App., 518, 35 S. W. Rep., 881, sustains appellee's contention that under the rent contract shown by the evidence he became a tenant in common with appellant in the crop and pecans grown upon the rented premises, and as such can maintain a suit against his cotenant for the conversion of his portion of said crop and pecans. It follows that the suit could be brought at any time after the conversion of the property, and appellee was not required to wait until the expiration of the term of the lease before bringing suit. The rule which requires the plaintiff in a suit for breach of a contract of hire to show that he has not been able to obtain other employment can have no application to a suit of this character. While appellee might have brought an action for restoration of possession of the premises, his failure to do so can not defeat his right to recover the value of his property unlawfully converted and disposed of by the defendant.

The issue as to whether appellant forcibly ejected appellee from the



premises and prevented him from gathering the crop of cotton and pecans was properly presented by the trial court in his charge to the jury and the special instruction requested by appellant upon that issue was properly refused. The offer of the appellant after the suit was brought to pay plaintiff his portion of the proceeds of the cotton and pecans which had been gathered and sold by appellant and to permit plaintiff to re-enter upon said premises and gather the remainder of the pecans, and the refusal of the plaintiff to accept said offer, would not defeat his recovery, and the trial court correctly refused to so instruct the jury as requested by appellant. If such offer could be regarded as a tender it would only affect the question of costs, but the evidence only shows an ineffectual attempt on appellant's part to compromise the suit after it had been brought, and does not raise the issue of tender. In the case of *Tignor v. Toney*, supra, the rule that one who has tortiously taken and converted the property of another can not charge the rightful owner with labor expended by the wrongdoer upon the property whereby its value is increased, is applied to a conversion by one tenant in common of the interests of his cotenant in a growing crop, and such cotenant suing to recover the value of his interest in the crop which had been gathered and sold by the wrongdoer can not be charged with the cost of gathering the crop. Under this rule appellant was not entitled to show the cost of gathering the pecans, and the trial court did not err in excluding testimony offered by him for that purpose.

We think none of appellant's assignments should be sustained and that the judgment of the court below should be affirmed, and it is so ordered.

*Affirmed.*



WOFFORD & RATHBONE V. BUCHEL POWER AND IRRIGATION COMPANY.

Decided April 19, 1904.

1.—Electricity—Contract—Warranted Capacity—Charge—Weight of Evidence—Assuming Facts.

In a suit upon a contract to furnish current enough to run a 75-horse power motor for purposes of irrigation the court properly refused a requested charge that "the warranted capacity of the electrical motor described in the contract upon which plaintiff sues is 75-horse power, but any additional horse power which said motor could safely develop and which was required to perform its work \* \* \* is also within the warranted capacity of said motor within the meaning of said contract," such charge being objectionable: (1) Because the warranty as to the horse power of the motor, not being evidenced in writing and being a matter in dispute, the charge was on the weight of evidence. (2) It assumed that defendant contracted to furnish such quantity of current as the motor would safely stand, however much horse power it might develop, if plaintiff's pump required more to perform the work put upon it.

2.—Liability—Measure of Damages—Immaterial Error.

The court's general charge on the measure of damages and the refusal of special charges upon that issue, if error at all, were immaterial where the verdict is manifestly based on the issue of liability and the jury did not reach the issue of damages.

3.—Evidence—Letters and Telegrams.

Letters and telegrams from an electric company, from whom a motor was bought, addressed to defendant, were admissible upon the issue of warranted capacity of the motor where the evidence shows that defendant acted as the agent of plaintiff in the purchase of the motor.

4.—Practice in Trial Court—New Trial.

The trial court properly sustained an exception to a motion for new trial filed twenty days after rendition of judgment, not showing why it was not filed sooner and not sworn to.

Appeal from the District Court of De Witt. Tried below before Hon. James C. Wilson.

*Kleberg, Grimes & Schleicher and Davidson & Bailey*, for appellants.

*George J. Schleicher and Denman, Franklin & McGown*, for appellee.

GILL, ASSOCIATE JUSTICE.—This is a suit by appellants to recover of the appellee, a corporation, damages alleged to have resulted from a failure on the part of appellee to furnish to appellants sufficient electrical current to operate to its warranted capacity a 75-horse power electric motor used by them for pumping water for irrigation purposes, and which current the appellees had contracted to furnish. A trial by jury resulted in a verdict for appellee.

The appellants were the owners of 340 acres of land near the Guadalupe River in De Witt County, upon which they wished to grow rice by irrigation from the river. The appellee was a corporation engaged in the generation and sale of electric current for lighting and power. The appellants having determined to operate their pump by electric power, concluded to purchase an electric motor from the General Electric Company. Having had no previous dealings with that concern, they induced the appellee through its officers to make the purchase



for them, which they did without charge for their services. Appellants thereupon entered into a contract with appellee whereby the latter was to furnish the current to operate the motor. The material part of this contract is as follows:

"The party of the second part (the appellee) hereby agrees and contracts to supply to the said transmission line of the said party of the first part electric current at a voltage pressure at approximately 2300 volts and in sufficient quantity to drive to its warranted capacity a certain 75-horse power electric induction motor which the said party of the second part has ordered for the said party of the first part from the General Electric Company of Chicago, Ill." (The latter company was made a party defendant on the prayer of appellee, but when the evidence was closed was dismissed from the case.)

The motor was installed, the land planted in rice and the irrigation begun. Fifty acres were properly irrigated and made a full crop. Forty-five acres for want of sufficient water made only a partial crop. The remaining 240 acres produced nothing for want of water.

On the general question of liability two controlling issues were presented by the pleading and proof, viz., what was the warranted capacity of the motor and whether appellee had furnished sufficient current under the contract. Upon these points the evidence was conflicting, but was ample to sustain the conclusion that sufficient had been furnished to operate the motor to its warranted capacity when properly handled.

By the first and third assignments appellants complain of the refusal of the trial court to give their first requested charge, which is in the following language: "Plaintiffs request the court to instruct the jury that the warranted capacity of the electrical motor described in the contract upon which plaintiff sues is 75-horse power, but any additional horse power which said motor could safely develop and which was required to perform its work in operating the pump which it was intended to operate is also within the warranted capacity of said motor within the meaning of said contract."

The court did not err in the respect complained of. To the charge requested there are at least two fatal objections. In the first place the warranty as to the horse power of the motor, not being evidenced by writing and being a matter in dispute, the charge was manifestly on the weight of evidence. And second, it assumes that appellee contracted to furnish such quantity of current as the motor would safely stand, however much horse power it might develop, if plaintiff's pump required more to perform the work put upon it.

There was testimony to the effect that with the current furnished the motor was sometimes required to develop double the horse power mentioned in the contract, though under normal conditions 65 horse power was ample to lift 4200 gallons of water per minute, the amount the pump was expected to lift. It is manifest from the terms of the contract that the appellee's obligation was measured by the warranted capacity of the motor and not the amount which by actual experiment



it might be found able to endure. The trial court in his general charge properly left to the jury the issue of warranted capacity to be found as a fact, as well as the issue of due performance of its contract on the part of appellee.

This disposes also of the second assignment, which assails the court's general charge upon the point.

The fourth and fifth assignments are addressed to the court's general charge on the measure of damages and the refusal to give special charges upon that issue. We are of opinion the matters complained of, if error, are immaterial, as the verdict is manifestly based on the issue of liability and the jury did not reach the issue of damages.

The sixth assignment complains of the introduction of certain letters and telegrams received by the appellee from the General Electric Company during the negotiations for the purchase of the motor for appellants. They were adduced over appellant's objection upon the issue of warranted capacity. We are of opinion they were admissible. There is some evidence tending to show they were shown to Rathbone, one of the appellants, and further it appears that appellee acted as the agent of appellants in the purchase of the motor. Communications addressed to them containing warranties as to the power of the motor would inure to the benefit of appellants and were admissible on the issue.

The seventh, eighth, ninth and tenth assignments complain of the action of the court in sustaining exceptions to the supplemental motion for new trial. Within two days of the rendition of the judgment a motion for new trial was duly filed. Twenty days later, and shortly prior to the adjournment of the court, they filed a supplemental motion which set up the following additional facts: (1) The jury which tried the cause did, before they were impaneled, visit appellee's power plant and were probably influenced in their verdict by what they saw. The motion shows that the fact was known to appellant's before the jury were selected to try the cause. (2) Because the jury discussed the case among themselves before the cause was submitted to them by the charge of the court. (3) That Tom Smith, one of the jurors, was approached by some unknown person and told not to decide the case according to his own judgment but to go with the white men on the jury.

The motion did not disclose when these facts came to the knowledge of appellants or why they were not sooner presented. It was not sworn to, nor were there any supporting affidavits.

The motion was excepted to on the ground that it was not made within two days of the date of the judgment, nor reasons given for not sooner presenting the facts, and further because it was not sworn to. These exceptions were sustained and appellants refused to amend.

The first ground was manifestly too vague to require consideration. As to the second and third grounds they presented matter requiring an investigation of the facts. The motion was not sworn to. It did not disclose the names of the witnesses by which its allegations were to be



established nor in any other way point out the means by which the court might inform himself of the facts alleged.

A motion for a new trial filed later than two days after the judgment is addressed to the trial court's discretion and we are unwilling to hold that the trial court abused that discretion by refusing to institute a general investigation of the unsworn allegations of the supplemental motion, especially when appellants refused to swear to it or append affidavits or otherwise amend after the exceptions were sustained.

We find no reversible error in the record. The judgment is therefore affirmed.

*Affirmed.*

Writ of error refused.



A. W. HOOVER ET AL. V. D. C. THOMAS ET AL.

Decided April 20, 1904.

**1.—Election—Keeping Polls Open.**

The fact that the election officers closed the polls for about an hour at noon, while they went to dinner, no one being prevented from voting thereby, did not render illegal the votes cast at such voting place.

**2.—Local Option Law—Constitution.**

Though the local option law so far as it authorizes the combining of two or more justice precincts of a county into a subdivision thereof for holding an election for the prohibition of the sale of liquors under the local option law should be held unconstitutional (Ex parte Heyman, 45 Texas Crim. Rep., —), such ruling would not involve the constitutionality of an election under the law for the entire county.

**3.—Same—Payment of Poll Tax.**

Though parties who had not paid their city poll tax were permitted to vote at a county election under the local option law the election was not invalidated thereby in the absence of a showing that the exclusion of such votes would have altered the result.

**4.—Local Option Law—Constitutionality.**

The local option law as to elections for counties held not violative of the State or of the Federal Constitution.

Appeal from the District Court of Lampasas. Tried below before Hon. Clarence Martin.

*Walter Acker*, for appellants.

*W. H. Browning*, for appellees.

KEY, ASSOCIATE JUSTICE.—On May 30, 1903, an election was held in Lampasas County to determine whether or not the sale of intoxicating liquors should be prohibited within that county. Appellants, who are liquor dealers in that county, brought this suit against the members of the Commissioners Court to contest the election and restrain the court from declaring the result and entering an order declaring prohibition in force in that county.

The district judge granted an injunction in chambers, but at the hearing upon trial the injunction was dissolved and the case decided against the contestants. The trial judge filed the following conclusions of fact, which are approved and adopted by this court:

“Conclusions of Fact.—1. I find that the plaintiffs A. W. Hoover and E. J. Noyes, composing the firm of Hoover & Noyes, W. M. Patton, Geo. W. Skaggs, Mat Smith and J. A. Tillman, are now and were and have been for two years prior to May 30, 1903, lawfully engaged in the retail liquor business in Lampasas City, county of Lampasas, and have paid all taxes, State and county and city, for the privilege of pursuing said occupation, and that nearly or quite all of their means were invested in buildings, furniture and fixtures and stocks of wines and liquors, which were and are now owned by them.

“2. That on the 13th day of May, 1903, the defendants, acting as



the County Commissioners Court of Lampasas County, Texas, ordered an election to be held on the 30th day of May, 1903, throughout the county of Lampasas, to determine whether or not the sale of intoxicating liquors should be prohibited in said county.

"3. That in pursuance of said order, an election was held on the 30th day of May, 1903, at the several voting precincts in said county, and that the defendants, composing the Commissioners Court of said county, met on the 10th day of June, 1903, to canvass the returns and declare the result of said election, and that said returns of said election from all the said voting precincts showed on their face a majority of 26 votes for prohibition, but by reason of the injunction heretofore issued, said Commissioners Court did not declare the result of said election.

"4. That the election at the Lometa box in said county was opened at 8 a. m. and closed at 6 p. m., but that at 12 o'clock m. the officers of the election adjourned for dinner, and all except the presiding officer remained away about one hour, he, the presiding officer, being absent from the polling place about twenty minutes; that during the adjournment, the ballot boxes, tally sheets, etc., remained in the actual possession of two of the officers of the election, and were not in any manner changed or tampered with, but were returned to the polling place after said recess, in the same condition as at the time of adjournment, when said election was proceeded with. I find that no one by this adjournment, or from any fraud or intimidation, was deprived of the privilege of voting. I further find that the officers of said election at Lometa did not take advantage of their positions to influence and intimidate voters, and that the presiding officers did not open and examine ballots to open and expose same.

"5. I find that there was no interference with the election at Lometa, Rock Church or Adamsville by the ladies and children.

"6. I find that the ladies and children at the Lampasas box used persuasion only and did not intimidate or prevent any voter from voting the anti-prohibition ticket.

"7. I further find that no legal voter was deprived of the right to vote as he pleased at any box in the county.

"8. I find that Arch Hatley was a qualified voter at the Adamsville box, and was refused the privilege of voting, but that this was because he failed to produce his poll tax receipt, and refused to swear that he had paid said poll tax prior to February 1, 1903, as required by law.

"9. I find that the election throughout the entire county was fair and the will of the people fairly expressed, and that no fraud or intimidation was practiced or indulged in at any voting box in said county.

"10. I find, and it is admitted by the counsel for the purpose of this trial, that if the Lometa box had been counted prohibition would have carried in Lampasas County by a majority of 26 votes. I further



find that prohibition has carried by a majority of 26 votes, at the election held May 30, 1903.

"11. I further find that at Lampasas and all other voting boxes in the county where acts of intimidation were charged by reason of the conduct of ladies, children and others, that no such intimidation occurred, and that acts of persuasion occurred as freely upon the part of those laboring for the cause of anti-prohibition as those working for the cause of prohibition, and that nothing was done in an unlawful manner, nor was there any interference with the result of the election in any wise by reason of such acts on the part of either side."

*Opinion.*—1. Several of the trial court's conclusions of fact are challenged in this court, but an examination of the testimony leads us to the conclusion that all of the findings complained of are amply supported by testimony.

2. The fact that the polls were not kept open during the entire time prescribed by the statute does not authorize a holding that the election was void, it not being made to appear that any voter was thereby deprived of an opportunity to vote. The provision of the statute referred to is not mandatory in the sense that its nonobservance will vitiate and render nugatory an election. *McCrary on Elections*, sec. 130; *Suth. on Stat. Con.*, sec. 452; *Truehart v. Addicks*, 2 Texas, 217; *Fowler v. State*, 68 Texas, 36.

3. If it be true, as held by the majority of the Court of Criminal Appeals in *Ex parte Heyman*, 45 Texas Crim. Rep., —, that the provision of the statute authorizing the commissioners court to combine two or more justice precincts, or other political subdivisions, for the purpose of a local option election, is unconstitutional, it does not follow that the election in this case was illegal. It was held for and in the entire county, and was authorized by the Constitution and other provisions of the statute in nowise dependent upon those provisions held unconstitutional in the case cited. *Sweeney v. Webb*, 33 Texas Civ. App., —.

4. If it be conceded that persons residing within the city of Lampasas were not entitled to vote unless they had paid their municipal poll tax, it does not follow that the election in this case was void for that reason. The only evidence on that subject consisted of an admission by appellees in their answer, to the effect that the election officers at Lampasas box permitted persons to vote who had not paid their city poll tax; but it was not shown how many of that class of persons voted, nor how they voted. In the absence of a showing that by excluding the votes referred to the result would have been different, we are of opinion that appellants have no grounds of complaint because of the ruling of the election officers referred to.

5. Appellants also assail the local option statute, charging that it violates provisions of both State and Federal Constitutions. The ob-



jections urged have been passed upon by this and other appellate courts and decided against appellants. *Rippy v. State*, 68 S. W. Rep., 687; *Sweeney v. Webb*, 33 Texas Civ. App., —; *Black v. Pool*, 3 Texas Law Journal, 428; *Mercer v. Woods*, 33 Texas Civ. App., —.

No reversible error has been pointed out and the judgment is affirmed.

*Affirmed.*

Application for writ of error dismissed for want of jurisdiction June 23, 1904.



INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY ET AL V.  
R. E. CAIN.

Decided April 20, 1904.

**1.—Evidence—Injury—Complaints of Suffering.**

Complaints of suffering in his back, made by plaintiff in a suit for personal injury, held admissible as original evidence, as being expressions of present pain.

**2.—Damages.**

Evidence held sufficient to support a recovery of \$500 for personal injuries to a railway passenger from collision of train with an engine.

Appeal from the District Court of McLennan. Tried below before Hon. Sam R. Scott.

*Baker & Thomas, Clark & Bolinger, and J. A. Kibler, for appellant.*

*Taylor & Gallagher, for appellee.*

EIDSON, ASSOCIATE JUSTICE.—This is an action by appellee against appellants for damages for personal injuries alleged to have been received by him while a passenger on one of the regular passenger trains of the appellant, the International & Great Northern Railroad Company, in a collision between said train and one of the switch engines of appellant, the St. Louis Southwestern Railway Company of Texas, near the city of Waco, on December 6, 1902; the plaintiff alleging in his petition that he entered said train at Waco for the purpose of going to his home in the town of Ottoo, intending to pay his fare in cash on demand; that his train pulled out from the depot towards the Brazos River, and about the time said train entered on the bridge crossing said stream, on account of being annoyed by some drunken men who were on the car in which the plaintiff was riding, he got up from his seat, and went to the front end of the smoking car on said train, and was in the act of taking his seat, and was turning back the back of his seat upon which he intended to sit, and just as he lifted the back of said seat a terrific and violent collision occurred about midway on the bridge crossing the Brazos River, and on account of the jar and collision plaintiff was thrown over the back of the seat he was turning to the back of the other seat, and was painfully and permanently injured.

The trial of the case before a jury resulted in a verdict and judgment in favor of the appellee for the sum of \$500 jointly against the two appellants.

The fourth assignment of error of appellants complains of the action of the court below in admitting, over the objections of appellants, certain testimony of R. A. Cain and J. F. Cox, witnesses for appellee. The witness R. A. Cain testified that appellee came home with his hand



wrapped up, and complaining of a hurt in his back. Appellants objected to the latter part of said statement that appellee was complaining of a hurt in his back, upon the ground that same was hearsay and self-serving. Appellants objected to the following testimony of the witness J. F. Cox, upon the same ground as above stated: "Appellee said he was hurt; said he was hurt in the back." The witness R. A. Cain testified in connection with the statement above quoted, as excepted to, as follows:

"I am the father of plaintiff and remember the time he left to go to Falls County. He came home with his hand wrapped up, and complaining of a hurt in his back. It was late at night. The next day he complained of his back hurting him right smart, and asked me to go over and phone to Dr. Wilcox, which I did. \* \* \* He made a great deal of fuss in his sleep, groaning and rolling. Several times had his back rubbed with liniment."

The witness Cox, in connection with the statements above quoted, and objected to by appellant, testified as follows: "I remember the time plaintiff left home to go to Falls County, on the 6th of December. I know he left about that time, but do not remember the date. All I know is he came back home and said he was hurt. I do not remember whether the plaintiff came back the next day after he left or the third day after he left, nor do I remember the day of the week he left. I was at home when he came back. I did not see him until he came in the house. He came in and said he was hurt. When he came in he looked like he was hurt. He looked very bad. He just came in and said he was hurt on the train. He had his hand in a sling. All I know about his back was he could not walk right. When I came in they had just pulled his shoes off, and told him to go to bed. He went to bed. He said he was hurt on the train. He said he was hurt in the back. \* \* \* I know when he went to bed he complained and groaned all night."

The statements of appellee testified to by said witnesses, to which objection was made by appellants, when viewed in connection with the other testimony of said witnesses relating to what was said and done by appellee at the time of making such statements, are, in our opinion, expressions of present pain and suffering, and were therefore admissible as original evidence. *Houston & T. C. Ry. Co. v. Schafer*, 54 Texas, 648; *Wheeler v. Tyler S. E. Ry. Co.*, 91 Texas, 358; *Missouri K. & T. Ry. Co. v. Johnson*, 67 S. W. Rep., 771.

The only other assignment of error presented in appellants' brief is the eighth, which complains of the action of the court below in overruling defendant's motion for a new trial, which set up that the verdict of the jury was contrary to the law and the evidence, in that it appeared from the evidence that the appellee was not injured in any appreciable degree, if at all, and that the alleged injury to his back, of which he complained, was feigned and was an afterthought upon his part, after



conversing with the witness Cavitt after he got off the train. This was a question of fact for the jury, and the same was properly submitted to them by the court in its charge, and they found in favor of the appellee; and we are of the opinion that there is testimony in the record to support the verdict of the jury.

Finding no reversible error in the record, the judgment of the court below is affirmed.

*Affirmed.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v.  
CONRAD BAKER.

Decided April 20, 1904.

**1.—Leading Question.**

An interrogatory is not necessarily leading because it can be answered by yes or no, if it does not suggest the answer expected.

**2.—Evidence—Harmless Error.**

Admission of improper evidence is not ground for reversal if the same evidence has come in at another point without objection.

**3.—Master and Servant—Promise to Repair—Charge.**

Charge on continuance of servant in employ in reliance on promise to repair defects of which he has complained held correct and sufficiently full in the absence of request for more specific instructions.

**4.—Promise to Repair—Time of Performance.**

The promise of the master to repair defects which will relieve the servant from assumption of risk therefrom need not be to repair in a definite time. Till a reasonable time for compliance has elapsed the servant may continue work in reliance on the promise.

Appeal from the District Court of Grayson. Tried below before Hon. Rice Maxey.

*T. S. Miller and Head & Dillard*, for appellant.

*Smith, Templeton & Tolbert*, for appellee.

EIDSON, ASSOCIATE JUSTICE.—Appellee brought this action against appellant to recover damages for personal injuries sustained while engaged at work for appellant in its shops at Denison, caused by a heavy iron car wheel falling on him through the negligence of appellant in not providing a reasonably safe place for him to work. A trial before a jury resulted in a verdict and judgment in favor of appellee for \$5000, to reverse which this appeal is prosecuted.

Appellant's first assignment of error complains of the action of the court in refusing to strike out the answer to the third direct interrogatory in the deposition of appellee. The interrogatory objected to was as follows: "If you had not received the assurance from Mr. Coppen that the floor would be fixed or repaired, would you have continued working there?" The answer to this interrogatory was as follows: "If Coppen had not promised that the floor would be fixed I would not have gone on working there. It was right in the way of where I had to roll the wheels, taking them in and out."

The objection to the interrogatory was that it was leading and suggestive. We are inclined to the opinion that the interrogatory was not subject to the objection interposed. An interrogatory is not necessarily leading because it admits of a direct affirmative or negative answer. It must also suggest the desired answer. This interrogatory did not do



this. *International & G N. Ry. Co. v. Dalwigh*, 92 Texas, 655; *Lott v. King*, 79 Texas, 292. However, there is another reason why the action of the court was not error, because substantially the same testimony as that complained of was admitted without objection. This witness, in reply to the fourth interrogatory embraced in his deposition, answered: "I did regard the hole as dangerous after the wheel went into it and fell over, two or three days before I got hurt. I thought so then because the wheel fell over, and if it had fallen on anybody it would have hurt them, and it would have hurt me if it had fallen on me. I would have quit the place, if I had not thought he would fix it." Evidently the appellant was not injured by the admission of the answer to the interrogatory objected to, and the court did not err in refusing to strike out such answer.

The charge of the court, when considered and construed as a whole, is not subject to the criticisms of appellant embraced in its second and third assignments of error. The court in its general charge required the jury to believe, before they could find in favor of appellee, that he believed that the foreman would comply with his promise to repair the defect in the floor, and that he relied upon such promise to repair; and the charge also instructs the jury that where a promise to repair was made and the employe has reasonable ground to believe and does believe that same will be complied with, and if, under all the circumstances, an ordinarily prudent person would continue in said service and rely upon such promise, then that such employe did not by continuing in the employment assume the risk incident to the discharge of his duties in performing his work at such place for a reasonable time after such promise is made for such defects to be repaired.

We are of opinion that the charge of the court was correct, and sufficiently full and specific as to the matters complained of; but if it was not sufficiently specific and full, being correct as far as it went, appellant should have requested special charges covering the points which its claims were omitted from the general charge. It was not necessary, in order to relieve appellee of the assumption of the risk caused by the defect in the floor complained of while continuing in the service of appellant, that the promise to repair same should have fixed any definite time within which such repairs would be made; and it was not necessary that they should in fact be made within any specified time. In all such cases the master has a reasonable time within which to comply with such promise, and until it is or should be manifest to the servant that the promise to repair would not be complied with, and that the defect would not be remedied, a further continuance by him in the master's service will not impose on him the assumption of the risk occasioned by such defect. The question as to what would be a reasonable time, under the particular facts of this case was a question of fact for the jury to determine, and this question was properly and correctly submitted to the jury.



This disposes of all of the assignments of error presented in appellant's brief. There is no complaint made as to the sufficiency of the testimony to sustain the verdict of the jury. However, we have examined the testimony in the record, and it appears to be amply sufficient to support the judgment of the court below.

Finding no reversible error in the record, the judgment is affirmed.  
*Affirmed.*

Writ of error refused October 12, 1904.



INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY v.  
ANGELINA HALL ET AL.

Decided April 20, 1904.

**1.—Evidence—Sale of Railroad.**

The fact of the sale of a railroad by one company to another may be proved by parol though the contract was in writing.

**2.—Same—Judicial Knowledge—Special Law.**

The courts being required to take judicial knowledge of the special law under which the International & Great Northern Railroad Company purchased the road of the Calvert, Waco & Brazos Valley Railway Company, know therefrom that the purchaser assumed the liabilities of the selling road.

**3.—Railway in Street—Right of Pedestrian—Charge.**

Pedestrians are not chargeable with negligence in walking on a railway track located along a public street except where circumstances show a lack of ordinary care in so doing; and it was proper to charge that they had an equal right with the railway to use such street.

**4.—Railway in Street—Negligence—Speed—Signals—City Ordinance.**

Running an engine along a public street at a speed prohibited by, or omitting signals required by a city ordinance is negligence in law; in the absence of proof of the ordinance negligence in high speed or omission of signals is a question of fact.

**5.—Evidence—City Ordinance—Published Pamphlet.**

The ordinances of a city incorporated under the general law can not be proved by the introduction of a pamphlet purporting to contain them without other proof that it was published by authority of the city council than a printed statement on the back of the pamphlet; neither article 558 nor article 2304 of the Revised Statutes authorizes ordinances to be so proved.

Appeal from the District Court of Falls. Tried below before Hon. Sam R. Scott.

*N. A. Stedman, Martin & Eddins, and Waller S. Baker, for appellant.*

*Rice & Bartlett, for appellee.*

FISHER, CHIEF JUSTICE.—This is an action by Angelina Hall for herself and as the next friend of her minor children against the appellant for damages resulting from the death of Dave Hall, her husband and father of the minors, alleged to have been carelessly and negligently killed by one of appellant's locomotives running over him when operated along its line of road in one of the public streets of the town of Marlin, Falls County.

Appellant pleaded general demurrer and general denial and contributory negligence. Verdict and judgment were in favor of appellees for \$5000 actual damages. The appellant has appealed.

It appears from the facts that the deceased, Dave Hall, while walking on the railroad track, which was located on one of the public streets of the city of Marlin, was killed by one of the engines of appellant, to which was attached a tender, backing over and against him. At the time of the accident the railroad in question was known as the Calvert, Waco & Brazos Valley Railway. A special act of the Legislature, of



which the courts will take judicial notice, by its terms empowered and authorized the International & Great Northern Railroad Company to purchase the Calvert, Waco & Brazos Valley Railway, and made the purchasing road liable and responsible for all the liabilities of the road purchased.

There is parol evidence in the record that subsequent to the accident the International & Great Northern Railroad Company had purchased the Calvert, Waco & Brazos Valley Railway. The appellant by an assignment of error complains of this evidence on the ground that parol testimony of the purchase was not admissible. We can not agree with this contention. If the witnesses who testified to the fact knew of the purchase of the defaulting road, by the International, we see no reason why such testimony should not be admitted.

The second proposition urged by the appellant under the assignments that raise this question is to the effect that if the purchase was established, there was no evidence of the liability of the International road for the acts of negligence of the Calvert, Waco & Brazos Valley Railway Company. The act of the Legislature under which the International acquired this road makes the former liable and responsible for the liabilities of the road so purchased, and this act the courts will take judicial knowledge of.

Without discussing appellant's twelfth and thirteenth assignments of error, we are content with the statement that they should be overruled, for in our opinion the verdict is not excessive, and the facts are of such a character that the jury was authorized to draw the conclusion that the deceased was not necessarily guilty of contributory negligence at the time he was killed. The railroad in question was located along one of the used and traveled streets of the city of Marlin. The court instructed the jury that pedestrians had the equal right with appellant to use the street. We understand this to be the law. The public have the equal right with the railway company to the use of the streets, and a proper use of the street by a pedestrian would not necessarily charge him with contributory negligence, unless the circumstances were such as to indicate to a man of ordinary prudence that the use of the street at the particular time and place so used would be attended with danger. It was proper for the court to instruct the jury as to the right of the public being equal to that of the railway company, subject, however, to the qualifications just stated.

The charges complained of in the third and fourth assignments of error were evidently predicated upon the idea that there were valid ordinances of the city of Marlin which required those operating locomotives along the public street to continue to ring the bell and not to cause the engine to exceed a speed of four miles an hour. If such ordinances existed it was proper for the court to instruct the jury that the failure to comply with them in the respects pointed out would constitute negligence; subject, however, to the qualification that such negligence would not be actionable unless the breach or violation of such ordinances con-



tributed to the accident. If no such ordinance existed, then the court, if the pleadings and the facts authorized it, could instruct the jury that the failure to ring the bell, or causing the engine to be run at a dangerous rate of speed, under the circumstances, might constitute negligence. If, under the circumstances, ordinary caution and prudence would suggest to those operating the engine that the safety of the public or some member thereof would, in the exercise of ordinary care, require the bell to be rung or the engine to be propelled at a moderate rate of speed, then such issues should be submitted, although there were no ordinances that required these things to be done.

We are inclined to the opinion that the charge of the court as criticised in the fifth and eighth assignments of error is possibly subject to the objections urged, but the phraseology of which will doubtless upon another trial be charged so as to meet these objections.

The ninth assignment of error is well taken. The document attached to the transcript, which purports to be a pamphlet or book containing the ordinances of the city of Marlin, was not admissible as evidence without proof of the fact that the book or pamphlet was printed and published by the authority of the city council. The mere statement upon the back of the book that it was a digest of the ordinances of the city of Marlin is not evidence of the fact that the book was printed and published by authority of the city council. When such fact is shown, then it would be properly admissible as evidence. We can not take judicial knowledge of the ordinances of a city incorporated under the general laws authorizing the incorporation of towns and cities, such as is the case of the city of Marlin; for it is held in *City of Austin v. Walton*, 68 Texas, 509, that such ordinances must be alleged and proved, like other facts. *Brush Elec. & P. Co. v. Lefevre*, 93 Texas, 607. Article 558 of the Revised Statutes provides that all ordinances of cities, where printed and published by authority of the city council, shall be admitted and received in all courts and places without further proof. There was no evidence offered and introduced tending to establish the fact that the document embodying the ordinances was printed or published by authority of the council. This article can not be aided by article 2304 of the Revised Statutes, because the latter article does not touch this question, as it merely provides a rule for proving the laws of this State, United States and Territories, sister States and foreign countries.

For the reasons stated, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Application for writ of error dismissed for want of jurisdiction June 16, 1904, *Hall v. International & G. N. Ry. Co.*, 98 Texas, 100. The application was by appellees, on the ground that the decision overruled *Galveston H. & S. A. Ry. Co. v. Washington*, 25 Texas Civ. App., 600.



## DENISON &amp; SHERMAN RAILWAY COMPANY v. J. L. CRAIG ET AL.

Decided April 20, 1904.

**1.—Street Railway—Ordinary Cars—Protruding Steps—Contributory Negligence.**

Plaintiff was not guilty of contributory negligence in stepping back from the track, upon the approach of a car, only a sufficient distance to avoid being struck by cars such as were ordinarily run on said track, he not knowing that the steps on the car which struck him extended further out from the body of the car than those generally in use and not being able to ascertain such fact because of the blinding light on the car.

**2.—Negligence—Discovered Peril—Steps on Car.**

Evidence considered and held to show negligence on the part of a motorman on a street railway car in failing to stop or check the speed of a car, on seeing plaintiff dangerously near the track, where the steps extended out further from the body of the car than those generally in use on that line.

**3.—Discovered Peril—Motorman—Acting on Presumption.**

An engineer or motorman may not act upon the theory that a person on or near the track, who sees the car approaching, will get out of the way of danger, after it becomes reasonably apparent that this will not be done.

Appeal from the District Court of Grayson. Tried below before Hon. J. M. Pearson.

*Head & Dillard*, for appellant.

*J. A. Templeton*, for appellee.

JAMES, CHIEF JUSTICE.—Judgment was rendered against appellant in favor of James Watt Craig, a minor (of 17 or 18 years of age when injured), for \$500, and J. L. Craig, his father, for \$100, on account of a personal injury to the former.

The assignments, in substance, present the questions of the sufficiency of the testimony to show a case of negligence on the part of appellant, and that the testimony indisputably shows that the boy was guilty of contributory negligence, and that he assumed the risk of the danger existing in the conditions wherein he received his injury.

The following facts were in evidence: The night was drizzling and very dark. James Watt Craig was a student of Austin College, in Sherman, and went to the crossing of College Street and Grand Avenue for the purpose of meeting some young ladies from town whom he had invited to an entertainment at the college that evening, and whom he was expecting on appellant's car. Professor Bondurant was there also to take a car back to town. The cars ran along Grand Avenue and the car in question came from the south. It appears that cars stopped at this place when signaled. The car in usual use on Grand Avenue was a small one six feet six inches wide, the steps of which hardly came out flush with the body of the car. The car in use on this occasion was known as an interurban car, which was much larger. These were a little less than nine feet in width on most of which the steps extend out an inch or an inch and a half. The car in question had a step which extended out about six inches. It was being run as a special



to convey some young ladies to a point beyond this crossing, with orders not to pick anybody up and to stop only at the other place. There was evidence that the unusual size of this car and the unusual projection of its step were unknown to plaintiff, and that the intense and blinding light from the car at which he was looking prevented his discovering or appreciating these facts. After signaling the car, he stepped back from the track, though not quite as far as Professor Bondurant did. The car approached rapidly and passed them without stopping or checking and the step struck plaintiff on the knee. The motorman testified that he was 100 or 150 feet away when he saw plaintiff on the track and when he stepped away from the track, but also said he whistled about a block away. Also: "I thought at the time he was standing there at the track that he had a foot to play on to be in the clear. I didn't know the width of the car then; I just judged he was about three feet away. Passengers stand close; they all stand close; I didn't think I was taking any chance in running up there that way; I thought he was clear." He stated further: "I couldn't say how far he was from the track; my best judgment is that he was about three feet, something like three feet; I *knew* he was within three feet of the track." This car extended out two feet from the track and the step went out six inches further. Plaintiff testified that he supposed all the cars were the same width, that he could not see the step at all, and did not know that the car had protruding steps. It is very clear that an ordinary car would not have struck plaintiff.

Ordinances of the city were shown, which required appellant to stop cars in the shortest time and space possible on the first appearance of danger to persons on the track or moving toward it; also to have a whistle, and on the approach of danger to any person to give the alarm by blowing said whistle.

As already said the questions presented are: (1) Was plaintiff guilty of contributory negligence and did he assume the risk, as a matter of law? (2) Was there sufficient evidence of negligence on the part of defendant?

There is no difficulty in answering the first of these questions in the negative. The position which the boy took was a safe one with reference to the ordinary cars which defendant used and with which he was familiar, and he had no notice or knowledge, up to the time he was struck, that the car was different, according to his testimony. The evidence admitted of such finding which would exonerate him from negligence. The same facts would exclude the idea of an assumed risk, if such theory has any place in this case as a distinct issue from contributory negligence.

As to defendant's negligence we think the evidence is amply sufficient to support such finding. The jury were not obliged to accept the motorman's statement that he did not know the dimensions of the car. They would have been warranted in believing that he must have known the reach of the step, if indeed defendant could be heard to say that it or



its servants were ignorant of such fact. The step went out two and one-half feet from the track, and the motorman says he knew plaintiff was standing within three feet. If he knew this under the circumstances while approaching plaintiff, the latter must have been perceptibly within three feet, or in other words dangerously close. He was close enough to suggest danger, as would appear from the fact that the motorman must have made a calculation on the probability of striking him or not striking him."

In *Texas & P. Ry. Co. v. Ball*, 96 Texas, 624, it is said: "The plaintiff's testimony must be sufficient to show that Ashley Ball was at some point on or near the railroad track within the range of vision of the engineer, while he was looking ahead in the discharge of his duty, in order to raise a presumption that the engineer did in fact see Ashley Ball in his perilous position in time to have given warning, or to have stopped or checked the train or by some means at hand to have prevented inflicting injury upon him."

The testimony in this case shows that the motorman for a considerable distance saw plaintiff assume the position he had taken, which was in fact a dangerous one in view of the construction of this car. He knew also that persons signaling a car to stop "all stopped close," from which testimony it naturally would be understood that they would stop close and remain close. He saw the entire situation and even considered and weighed the chances of the car passing plaintiff without striking him, which implied that he did not expect plaintiff to change his position. The jury, as already stated, were not required to believe that the motorman did not know the dimensions of his car and the reach of the step. He testified that he didn't know plaintiff wanted the car to stop: he thought that, and it wasn't his intention to pick him up. It would seem from this that he was intent on his orders, and did not intend to stop. Under these circumstances it was admissible for the jury to conclude that the motorman saw that plaintiff was exposed to danger if the car proceeded, and was negligent in not stopping or checking the car, or in not giving the danger signal.

The rule that an engineer or motorman may act upon the theory that a person on or near the track, who sees the train or car approaching, will get out of the way of danger, has no application after it becomes reasonably apparent that this will not be done. Appellant knew that the public would naturally regulate their conduct with reference to its cars that it had in common use, as the plaintiff was doing in this instance, and knew that this was not that kind of a car. The fact appears that the motorman continued to run his car with the idea that it would pass plaintiff where he was standing without its hitting him, and not upon the theory that he believed the latter would change his position.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



## GALVESTON CITY RAILWAY COMPANY v. H. L. CHAPMAN.

Decided April 20, 1904.

**1.—Assignment of Error—Like Evidence Not Objected to.**

An assignment of error objecting to evidence will not be sustained where like testimony was admitted without objection.

**2.—Charge—Negligence—Motorman.**

A charge instructing the jury to find for the plaintiff, in an action for damages for injuries sustained in a collision between two street cars, if they believed such collision was the result of the motorman's negligence, held, in view of the testimony, not misleading as to which motorman was meant.

**3.—Charge—Contractor—Personal Injuries—Loss of Time—Measure of Damages.**

Evidence that a contractor, injured in a street car collision, could not oversee or do the work he usually did and that he was forced to hire a foreman at a salary of \$25 per week to attend to this for him was sufficient proof of loss of time and value thereof to warrant a charge including such items in the measure of damages.

**4.—Mental Suffering—Measure of Damages.**

Mental pain may be inferred from the existence of physical suffering, as an element of the measure of damages.

**5.—Evidence—Earning Capacity.**

The fact that plaintiff, disabled by his injuries, was compelled to hire a foreman at \$25 per week was evidence bearing on his earning capacity.

**6.—Charge—Burden of Proof.**

Charge on burden of proof as given held less objectionable than the requested charge which was refused.

Appeal from the District Court of Galveston. Tried below before Hon. Frank M. Spencer.

*Terry, Ballinger, Smith & Cavin*, for appellant.

*Jas. B. & Chas. J. Stubbs*, for appellee.

**JAMES, CHIEF JUSTICE.**—The action is for damages for personal injuries alleged to have been received by appellee in a collision between two of appellant's cars upon one of which he was a passenger. He recovered judgment for \$750.

The first assignment of error is not sustained because, if objectionable, like testimony was admitted without objection.

The paragraph of the charge which is questioned by the second assignment is not fairly subject to any of the criticisms offered. It stated correctly the law. If defendant desired more apt reference of the charge to the particular facts, it should have asked that it be done. The petition confined the negligence complained of to the motorman of the car upon which plaintiff was a passenger, the south-bound car. His negligence was the issue. This paragraph of the charge read: "If you believe from the evidence that a collision occurred between the car on which plaintiff was riding and another car, \* \* \* and that plaintiff by said collision had his wrist sprained or dislocated, and that said collision and injury would not have occurred if the motorman of defendant company had been in the exercise of the care and skill here-



inbefore defined, and that the collision was the result of motorman's negligence, if he was guilty of negligence, your verdict will be for plaintiff."

The second proposition under the assignment is that the charge was erroneous because it did not inform the jury that the motorman intended thereby was the one on the car upon which plaintiff was a passenger. The testimony might have been such as to have shown such negligence on the part of the other conductor, or to afford reasonable ground for the theory that the charge as worded was misleading as to what motorman was intended. The testimony set forth in appellant's brief in connection with this proposition is not such as makes it at all probable that the jury construed the charge as having any reference to negligence of the conductor on the other car.

The charge mentioned in the third assignment did not place the burden of proof on defendant as is alleged.

The fourth assignment involves this charge: "In the event of your verdict being for the plaintiff, in assessing his damages you may take into your consideration the reasonable value of the time lost, if any, consequent upon his injuries, the necessary sums of money, if any, expended by him for medical attendance and medicine rendered necessary by his injuries, the bodily and mental pain, if any, suffered by or that may be suffered by reason of his injuries, and if you believe from the evidence plaintiff's injury is permanent, and will impair his capacity to labor and earn money in future, you may, in addition to the foregoing, find such sum as will be a fair and reasonable compensation for his future diminished capacity to labor and earn money."

Three objections are presented to the above: (1) That there was neither pleading nor testimony that appellee lost any time, or of the value thereof; (2) nor testimony that he suffered any mental pain, or would thereafter suffer any; (3) nor testimony of appellee's earning capacity.

The allegations of the petition embraced loss of time. He appears to have been a carpenter and contractor who superintended his work and worked himself. The injury entirely prevented him from working and from getting about to superintend his work for some time after the accident, and he testified that he has been compelled to employ a man to take his place at the wages of \$25 per week since he was hurt, that he did this work himself up to that time, and if he had not been hurt he would not have employed this foreman. There was testimony that it was several months after plaintiff was hurt before he was able to go up and down ladders in the holds of ships where his work was usually done. That previously he worked on all jobs he was doing just as the other men, but now he can not do anything that involves the deflection of his wrist, and that he has had to employ a man in his place ever since to do the work he had previously done.

This was evidence both of loss of time and of its value.



As to mental pain, this may be inferred from the existence of physical suffering.

As to earning capacity the fact that plaintiff was compelled to put a man to work in his place to do the work he had previously done at \$25 per week, was evidence bearing on the value of plaintiff's earning capacity.

The fifth assignment complains of the refusal of this charge: "You are instructed that the burden is upon plaintiff to prove his case by the evidence, and unless he has done so you will find your verdict for the defendant." Appellant admits that the court charged "the burden of proof is upon the plaintiff to make out his case by a preponderance of the evidence," but insists that it was nevertheless entitled to the further instruction embodied in the latter portion of the charge asked. This is upon the idea that the jury was incapable of comprehending the plain meaning of the charge that was given. Besides, the requested charge was not as free from objection as the one given, as it did not mention the preponderance of the evidence.

*Affirmed.*

Writ of error refused.



## HALLWOOD CASH REGISTER COMPANY v. J. M. BERRY ET AL.

Decided April 20, 1904.

**1.—Foreign Corporation—Permit—Pleading.**

A foreign corporation manufacturing articles sold in this State through its agents was not required to obtain a permit to do business in Texas, and consequently suit could be brought for purchase price of its goods without pleading and proving such permit.

**2.—Contract—Rescission—Waiver—Fraud.**

The continued use of an article after discovery of its worthlessness, while a waiver of the right to rescind the contract of purchase, does not preclude a recovery of damages for fraudulent misrepresentations in obtaining the contract.

**3.—Parol Evidence—Fraud.**

Parol evidence may be introduced to show fraud through which a contract has been obtained.

**4.—Contract—Notes—Cancellation—Fraud.**

Judgment canceling notes for the purchase price of a cash register machine and refunding the amount paid on it was supported by the evidence whether the jury found on the ground that the machine was worthless, in which case there would be an entire want of consideration, or that there was fraud in procuring the contract.

Appeal from the County Court of Dullas. Tried below before Hon. Ed. S. Lauderdale.

*Bell & Seay*, for appellant.

*Burgess & Burgess*, for appellees.

FLY, ASSOCIATE JUSTICE.—Appellant sued J. M. Berry and Mary D. Berry, a partnership doing business under the firm name of J. M. Berry & Sister, for \$240, less a credit of \$25, alleged to be due for a cash register. The Texas & Pacific Railway Company was joined as a party under an allegation that it had possession of the cash register upon which appellant sought to have a lien held by it foreclosed. A trial by jury resulted in a verdict and judgment in favor of J. M. Berry & Sister for \$25 and cancellation of a contract and notes evidencing the debt. Judgment was rendered in favor of the railway company.

Appellant is a foreign corporation that manufactures cash registers in Columbus, O., which are sold through an agency in Texas. Under the authority of *Miller v. Goodman*, 91 Texas, 41, appellant was not required to obtain a permit to do business in Texas, and consequently has full authority to prosecute this suit without pleading and proving such permit.

J. M. Berry testified that after he had gone to Dallas and ascertained that the defect in his cash register was one common to all cash registers manufactured by appellant, he went home and continued to use the register, and even after he had written that he intended to sue for the money he had paid on the machine and to cancel the notes he continued to use it for twelve or fourteen days. He knew the defects in the register, indeed he swore that he knew of them "from the



start," and yet he testified, "till I sent it back I kept it on my counter and used it in my business, I and my clerks registering our transactions on it, but it was no protection whatever. I did not send the machine back until I got a chance to come to Dallas and then I brought it with me."

In connection with the foregoing testimony the appellant requested the following charge: "If the defendants, after they or either of them discovered that the cash register was not as represented by plaintiff (if such was true), did not return same promptly to plaintiff, but continued after such discovery to retain and use said register after the plaintiff declined to take same back, then you will find against the plea of defendants asking a rescission of the contract sued on."

The rule is that a defrauded party must disaffirm the contract at the earliest practicable time after the fraud is discovered, and that he must return or offer to return whatever he has received from the other party, and if he retains the article purchased and continues to use it after discovery of the fraud that induced the purchase, he will be held to have waived the right to rescind the contract and to have acquiesced in it. In a Michigan case, cited by appellant, the above stated principle was discussed and applied as follows: "The testimony shows that just prior to the commencement of this suit the defendant notified the plaintiff that he would not keep the property, and plaintiff must take it away. This was not done, and defendant, by his own testimony, continued to use it. It was the duty of defendant as soon as he learned of the misstatements to have rescinded the contract; and notice of such rescission must have been promptly given, and adhered to, in order to bind the parties thereto. The continued use of the property for some thirty days after he had learned the facts would be a waiver of the right of rescission, even though notice of such rescission had been given." A number of Michigan decisions were cited in support of the rule announced, and the court proceeded: "While the court left the question of rescission to the jury, we think, under defendant's own testimony, the court should have instructed a verdict for plaintiff. We think defendant's continued use of the property for thirty days after he learned of the alleged fraud amounted to a waiver of any intent to rescind the contract." *Foster v. Rowley*, 67 N. W. Rep., 1077.

In the case of *Palmer v. Banfield*, 56 N. W. Rep., 1090, it appeared from the testimony that a reaper and harvester was delivered to the defendant on Thursday, and on Friday he discovered the defects in the machine and he decided to return it. However, he used the machine nearly all of Saturday and until he had finished cutting his grain, when he returned it, but the plaintiff refused to accept it. The Supreme Court of Wisconsin held that such use was an acceptance of the machine as a compliance with the contract, and was fatal to the rights to rescind.

In the case of *Bassett v. Brown*, 105 Mass., 551, it was held that a party led into a contract by fraud, "was entitled, upon discovering the



facts, to elect whether to affirm the conveyance and retain the consideration, or to avoid it. \* \* \* If, after such knowledge, he continues to deal with the property received as his own, he thereby affirms the contract by which he received it."

The testimony of J. M. Berry, one of the appellees, brings this case clearly within the scope and application of the rule laid down in the decisions cited. He knew that the machine was worthless and yet he used it after gaining such knowledge. He did not retain the machine after he went to Dallas for the purpose of further testing its usefulness and availability. He knew as much the first day he used it as afterwards, according to his own statements. He used it for the purpose for which he had bought it and thereby waived all right to rescind his contract of purchase.

While the evidence of retention and use of the register after knowledge of the fraud, precluded a rescission of the contract, it did not prevent a recovery of the damages resulting therefrom. There are allegations of a breach of the warranty of the machine, the misrepresentations by which the contract was obtained, and the total worthlessness of the machine. "If the fraud result in a contract, performance of the same, after discovering that it was fraudulently obtained by the opposite party, does not preclude a person suing for damages on account of the fraud. The injured party may retain the benefits of the contract, confirm its validity and still recover damages for the fraud by which he was induced to make it; or he may recoup any damages which he has sustained, if the opposite party sue him for money due on the contract or for failure to perform." The language is quoted from *Bigelow on Fraud*, and is approved in *Grabenheimer v. Blum*, 63 Texas, 369.

To hold, as contended by appellant, that parol proof can not be introduced to show the misrepresentation and fraud through which a contract has been obtained, would be to hold that fraud generally could not be proved in avoidance of a contract. "It is an elementary doctrine that parol evidence is not, in general, admissible between the parties to vary a written instrument, whether the same has been voluntarily adopted or made in pursuance of a legal necessity. It is equally well settled that mistake, fraud, surprise and accident furnish exceptions to this otherwise universal doctrine. Parol evidence may, in proper modes and within proper limits, be admitted to vary written instruments, upon the ground of mistake, fraud, surprise and accident. This exception rests upon the highest motives of policy and expediency; for otherwise an injured party would generally be without remedy." *Pom. Eq. Jur.*, sec. 858.

We think the evidence of fraud sufficient to justify a submission of the issue to the jury, and the same may be said as to the utter worthlessness of the register. The submission of that question to the jury imposed a burden upon appellees that they should not have borne in connection with the return of the machine, because if it was utterly worthless there was no necessity for a return of it.



If the jury found that the machine was utterly worthless, as they must have done under the instructions in order to have found that the machine was returned in a reasonable time, then there was a total failure of consideration, and the verdict was right, although the machine was not, as a matter of law, returned in a reasonable time. And if the verdict was not returned under the clause submitting the utter worthlessness of the machine and its return in a reasonable time, it can be justified under the clause presenting the issue of fraud and misrepresentation. In other words if the machine was worthless the notes should have been canceled and the money paid on the machine recovered, and if the contract was induced by fraud then the cancellation of the notes and recovery of the money was right. In either event the jury responded to the correct measure of damages.

There is no error requiring a reversal and the judgment is affirmed.

*Affirmed.*



SHIPPERS COMPRESS AND WAREHOUSE COMPANY v. LEONA  
DAVIDSON ET AL.

Decided April 20, 1904.

**1.—Obstruction in Street—Compress Company—Negligence Per Se—Proximate Cause.**

The act of defendant, a compress company, in obstructing a public street by a gangway over which bales of cotton were moved on trucks from one platform to another was negligence per se and the company was liable for the death of one whose horse took fright at the noise made by a servant of defendant engaged in moving cotton, a proximate cause being the negligence of defendant in erecting the obstruction.

**2.—Charge—Considered as a Whole.**

A paragraph of a charge was not objectionable as ignoring the issue of contributory negligence where another part of the charge submitted that issue.

**3.—Charge—Obstruction in Street—Flagman—Negligence.**

Defendant compress company can not complain of a charge requiring the jury to find, as a condition of recovery, that the work of trucking bales of cotton over a gangway across a street was under the direction of its general agent, and that there was no flagman to warn the people of the danger of such crossing, since neither condition was necessary to a recovery; the act of defendant in obstructing the street was in itself negligence which would render it liable for accidents proximately resulting therefrom.

**4.—Practice on Appeal—Defective Bill of Exceptions.**

A bill of exceptions complaining of the action of the court in refusing to allow a witness to answer a question put to him will not be considered on appeal where the bill does not show what the witness would have answered.

**5.—Death—Verdict—Minors—Attorney and Client—Judgment.**

Upon a verdict being apportioned by the jury between the wife and minor children of deceased, the court had no authority to render judgment for one-half to their attorneys, in accordance with a written agreement. Money adjudged to the minors could only be paid out by a guardian under orders of the probate court.

Appeal from the District Court of Kaufman. Tried below before Hon. J. E. Dillard.

*A. M. Carter*, for appellant.

*Thos. R. Bond* and *Wm. H. Allen*, for appellees.

FLY, ASSOCIATE JUSTICE.—Leona Davidson, describing herself as the surviving wife of W. I. Davidson, instituted this suit in her own behalf, and as the next friend of her minor children, Buelah, Milton, Clifford and Ira Davidson, to recover damages from appellant incurred by reason of the death, through negligence, of said W. I. Davidson.

Appellant filed general and special demurrers, and answered denying that its negligence had caused the death of W. I. Davidson, but if it resulted from negligence at all, it was that of some person for which appellant was not liable. Contributory negligence was not pleaded. Trial by jury resulted in a verdict in favor of appellees for \$4500.

The facts show that W. I. Davidson came to his death on December 17, 1901, through the negligence of appellant, and that appellees, his wife and children, were damaged in the sum found by the jury. A full



statement of our conclusions of fact will be found herein in connection with the discussion of the assignments of error.

Through the medium of the first and second assignments of error, appellant claims that the evidence failed to show that any negligence of appellant was the proximate cause of the death of W. I. Davidson, but that it shows that the negligence of appellant was not the direct and proximate cause of the injury and damages sued for, and the jury should have been instructed to return a verdict for appellant.

Grove Street runs east and west through the city of Terrell, and it was agreed that it was a public street and eighty feet wide. Appellant was, on December 17, 1901, engaged in the business of compressing cotton bales. It had a platform on the north side of Grove Street that was about six feet high and another on the south side of the street that was about one foot high. A gangway had been built from the southwest corner of the north platform to the south platform which ran on an incline downwards to about the center of the street to a bank or dump of earth constructed by appellant which ran on a level for fifteen or twenty feet, and then inclined upwards in order to connect with the south platform. The gangway was about seven feet wide. Only a space of fifteen or twenty feet was left in the street for the passage of vehicles, and those traveling along Grove Street, in order to cross the gangway, and those going east would have to pass over the gangway in the same manner, except that they would go down the incline. The superintendent of the compress company was in direct and immediate control of the compress and superintended the work. Cotton was placed on the north platform after being weighed, and was then transferred on trucks by negroes over the gangway to the south platform, where it was compressed. In transferring the cotton across the street the trucks would move rapidly down the incline and across the street. The gangway blocked up the street with the exception of fifteen or twenty feet, and travel on horseback or in vehicle was confined to this space. The gangway had been built and was being used without the authority of the city of Terrell.

The use of the street by appellant, in the manner that it was used, was unwarranted and in flagrant disregard of the rights of the public and in open violation of the laws of the State of Texas. Penal Code, art. 480. The building of the gangway being an obstruction of the street and a violation of a statute of the State, was negligence per se, and if such negligence was the direct and proximate cause of the injury and death of W. I. Davidson, appellant was liable for the damages resulting therefrom.

The question, then, of prime importance is, was the erection of the obstruction in the street the direct and proximate cause of the death of W. I. Davidson? The proximate cause is not necessarily the one nearest to the event, but the primary cause may be the one proximately responsible for the result although it may operate through one or more successive instruments. If the primary cause was so linked and bound



to the events succeeding it that all together they create and become one continuous whole, the one event so operating upon the other as to tie the result to the primary cause, the latter will be the proximate cause of the injury. If there is some new and independent cause disconnected from the first or original cause, operating in itself which intervenes to produce the result, the chain of sequence will be broken and the primary fault can not be held to be the direct and proximate cause of the injury. As said in *Gonzales v. Galveston*, 84 Texas, 3: "By proximate cause we do not mean the last cause, or nearest act to the injury, but such act wanting in ordinary care as actually aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be the concurring cause, such as might reasonably have been contemplated as involving the result, under the attending circumstances." In the case of *White Sewing Machine Co. v. Richter*, 2 Ind. App., 334, 28 N. E. Rep., 446, the matter is clearly and forcibly stated as follows: "Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but, as a rule, these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be the efficient cause of the injury." In discussing the rule as to determining proximate cause the Federal Supreme Court, in *Mutual Ins. Co. v. Tweed*, 7 Wall., 52, said: "One of the most valuable criteria furnished us by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient as the cause of the misfortune, the other must be considered as too remote."

The enunciation of the general rule as to proximate cause is not so difficult a matter as the application of the rule to the facts of the particular case, and the seeming differences between decisions on the subject arise from that difficulty and not from the formulation of the rule. The facts in this case, however, are simple, and we think the application will be attended with little difficulty.

On the morning of December 17, 1901, W. I. Davidson, with his little daughter, was driving his horse attached to his buggy into the city of Terrell, and started to drive across the gangway but stopped on account of a negro passing with a bale of cotton on a truck. After the negro had passed, the horse started over the dump or embankment that appellant had built in the street, and about the time the buggy got on top of the gangway, going west, another negro started down the gangway with another bale of cotton on a truck from the north platform and went on a run down past and in close proximity of the hind wheels of the buggy. As soon as the truck started down, the horse took fright



at the noise made by it and ran and turned the buggy over. Davidson and his daughter were thrown out and the former received injuries from which he afterwards died. The curtains of the buggy were up so as to prevent deceased from seeing the negro approaching with the truck.

If appellant is liable for damages resulting from the death of W. I. Davidson, it must arise from its own wrongful act, negligence, unskillfulness or default, and not from any negligence upon the part of its employe. Rev. Stats., art. 3017, sec. 2. It is the contention of appellant that the facts of this case, above enumerated, show that the death of W. I. Davidson was caused through the negligence of the negro with the truck, and that appellant is not liable for damages, no matter if it had been guilty of negligence in constructing the gangway across the street.

As before stated appellant violated the law of Texas in building the gangway across the street, and the accident would never have occurred but for that unlawful act. The act of moving the truck rapidly down the gangway, producing the noise that frightened the horse, was inseparably connected with the unlawful structure. Without the gangway the accident was impossible. It required the gangway as well as the moving of the truck to produce the result. They were active concurring forces producing the result. The intervening act of the negro in rolling the truck immediately behind the buggy and frightening the horse did not supersede the original unlawful act in putting the obstruction in the street. If the gangway had not been on the street, the negro could not have run the truck loaded with cotton at such a rate of speed across the street as to create sufficient noise to alarm the horse. The two causes were so closely conjoined that the one could not exist without the other, and when the negligence of the appellant concurred with the negligence of the negro it became as liable as though its negligence had been the sole moving cause of the disaster. There are numerous cases in which upon similar facts defendants have been held liable.

In the case of *Gonzales v. Galveston*, above cited, suit was instituted to recover damages for injuries inflicted on a child by the falling of lumber that had been unlawfully placed in the street. A drayman came in contact with the pile of lumber and knocked down some of it, which fell on a child that was not seen by the drayman, and severely injured her. The negligence asserted against the city was in permitting the lumber to remain in the street, and it was the contention of the city that the act of the drayman was an independent intervening cause and that it was not liable, in which contention it was sustained by the trial court. The Supreme Court said: "We do not think this is the principle governing the case. If it should be held that it was negligence on the part of the defendant at the time of the injury to have failed to remove the obstruction from the street, and this failure and the act of the drayman both concurring caused the injury, the city would be liable. This would be true whether the drayman was negligent or not. It is



true, if the drayman had not run his load against the lumber the accident would not have occurred, and on the other hand, if the lumber had not been in the street it would not have occurred. Dispense with either of these facts, and there would have been no injury." So in this case it may be true that if the negro had not run the truck over the gangway when he did the accident would not have happened, and it is equally true that if the gangway had not been there the injury would not have occurred. The two acts were interdependent and essential to each other in producing the result.

In the case of *Alice W. C. & C. C. Tel. Co. v. Billingsley*, 1 Texas Law Journal, 898, 77 S. W. Rep., 255, the facts showed that appellant placed a pole in a street in Beeville, where it should not have placed it, and while appellee was driving by it the horse by biting at a fly threw the buggy against the post and injured the appellee. It was held by this court that the location of the post in the street was the proximate cause of the injury, and a writ of error was refused by the Supreme Court.

So in the case of *City of San Antonio v. Lena Porter*, 24 Texas Civ. App., 444, the injury occurred through a horse, attached to a buggy, becoming frightened and backing from the street into the river, injuring the occupant of the buggy, and this court held that the proximate cause of the injury was the failure of the city to have a barrier along the river.

In an English case, *Burrows v. Gas Co.*, L. R. 5 Ex., 67, cited by *Buswell Pers. Inj.*, p. 167, the facts were that the gas company supplied the plaintiff with a service pipe to convey gas from the main to a meter in his house. Gas escaped from the service pipe and the servant of a plumber employed by the plaintiff went into the shop to ascertain the cause of the leak. He was carrying a lighted candle, and when he entered the shop an explosion took place damaging the goods and premises of the plaintiff. The court held that the negligent act of the servant in entering the room with a lighted candle did not relieve the gas company from liability.

In the case of *Barry v. Terkildsen*, 72 Cal., 254, a wooden covering had been placed on an excavation on a sidewalk, which had been made contrary to an ordinance, and the owner was held liable without proof that he had removed the covering. Also in a Georgia case, *Wilson v. White*, 71 Ga., 506, an obstruction in the streets was not guarded by lights as required by ordinance, and it was held that the owner of the material obstructing the street was liable although it was left unlighted through the negligence of a building contractor.

In the case of *Lane v. Atlantic Works*, 111 Mass., 136, the defendants left a truck with a bar of iron on it standing on a public highway of the city of Boston, in violation of an ordinance prohibiting such act. A boy moved the truck and the iron rolled off and hurt the plaintiff. The court in affirming a judgment in favor of the plaintiff said: "The act of a third person, intervening and contributing a condition neces-



sary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious effects which were to be anticipated, not in the number of subsequent events and agencies which might arise." The foregoing language was approved in *Mexican Nat. Ry. Co. v. Mussette*, 86 Texas, 708.

Applying the principle stated in the different authorities cited to the facts of the case, and we conclude that the negligence of appellant in erecting the obstruction was the direct and proximate cause of the death of W. I. Davidson. Such a result ought to have been foreseen by appellant when it built its gangway across the street, and the probability of the happening of such an event was emphasized by horses frequently getting frightened at the noise of trucks passing behind them. Appellant can not shield itself behind the acts of its servant who was using the agencies erected by appellant for the furtherance of its business. It might as well say that if it had placed a servant in the street with a gun in violation of law, and instructed him to fire it when no one was on the street, and he fired the gun and frightened a horse and caused him to kill a man, that the negligence of the servant in firing when some one was on the street relieved it of liability. The primary cause without which the accident could never have occurred will be sought for and held responsible for the results flowing from it. There is no force or strength in the argument that appellant would not be liable unless the gangway was defectively constructed. The wrong was not in defective construction, but in construction at all. The most perfect building of an obstruction across a street in violation of law, would not relieve the builder from the consequences of his unlawful act.

The court instructed the jury that if W. I. Davidson was guilty of contributory negligence in crossing the gangway, they should find for appellant, and also in case neither appellant nor its officers were guilty of negligence, appellees could not recover. In this immediate connection the court gave the following instruction: "The jury are further instructed if they believe and find from the evidence that the horse which W. I. Davidson was driving was frightened and caused to run away and occasioned the death of W. I. Davidson through the sole negligence of its employes in charge of its trucks, then you should find for defendant." The charge is objected to as excluding from consideration the contributory negligence of Davidson. The criticism is without merit. The different parts of the charge must be read together.

The court instructed the jury that if they found that the gangway was erected without permission of the city council, that appellants were engaged in carrying cotton by means of trucks on the gangway under the direction of Flowers, general agent of appellant, that appellant failed to have a flagman to warn people of the danger of traveling the street when appellants were using it, and such acts constituted negli-



gence on the part of appellant and that Davidson was exercising ordinary care to prevent his horse from becoming frightened, they should find for appellees. Appellant complains of the charge because Flowers was not present when the accident occurred and it was not proper to submit the issue of the truckmen acting under his direction. While there is evidence to the effect that Flowers did not see the accident, yet he was in direct control of the employes at the time and was in the immediate vicinity, and in a short time was on the scene of the disaster. If Flowers had not been in charge of the work on the day of the injury, we can not see how appellant was injured by the charge. It merely placed an additional burden upon appellees, and required proof of a fact that was not all essential to a recovery on their part, and appellant has no just ground of complaint.

If appellant was guilty of negligence in having the street obstructed, the question of having a flagman to warn persons approaching the gangway could not arise, but the court as a condition to recovery required the jury to find not only that it was negligence to have the gangway in the street, but in addition that it was the duty of appellant to have a flagman. The charge increased the burden of proof of appellees, and did not injure appellant.

It was negligence in appellant to erect the gangway across the street without permission of the city council, and the court did not err in permitting appellees to prove want of permission to build the gangway.

The bill of exceptions, upon which is founded the assignment complaining of the action of the court in not allowing appellant to ask witness Flowers if he had not obtained permission of the mayor of Terrell to build the gangway, is not sufficient to form a basis for reviewing the action of the lower court in that it fails to state what the witness would have answered in response to the question. Without that statement an appellate court can not determine whether the party complaining sustained any injury or not. *McAuley v. Harris*, 71 Texas, 639; *Gulf C. & S. F. Ry. Co. v. Locker*, 78 Texas, 279; *Cheek v. Haddon*, 82 Texas, 146.

While we consider the testimony as to a watchman at the gangway was immaterial, the uncontroverted facts showing that appellants were unlawfully using the street, we can not see how it injured appellant. If, as contended by appellant, it had the authority to place the gangway across the street, then the manner of its use made the question of having a watchman at the gangway a vital issue in the case.

The jury returned a verdict for \$4500, and apportioned \$100 to Leona Davidson and \$1100 to each of the four children. The court, after reciting that Leona Davidson for herself and as next friend for her minor children, had by her written agreement, which had been filed in the cause, transferred one-half of the claim to Thomas R. Bond and W. H. Allen, attorneys of record for the plaintiffs, rendered judgment giving appellees each one-half of what was allotted to them by the jury,



and giving the other half to the attorneys. There is nothing in the pleadings nor statement of facts justifying any such proceeding. The anomaly is therefore presented of a verdict being cut in half by the court and a judgment rendered for a sum of money in favor of parties not named in the verdict and not connected with the cause by pleadings or evidence, at the same time depriving the minor children of one-half of the sum awarded them by a jury without having the reasonableness of the fee determined by a court of competent jurisdiction. The District Court had no authority to take one-half of the amounts recovered by the minors and turn it over to the attorneys prosecuting the suit. No one had any right to receive or dispose of the money except a duly appointed guardian who would pay it out under the orders of the probate court. *Galveston City Ry. Co. v. Hewitt*, 67 Texas, 473; *Galveston Oil Co. v. Thompson*, 76 Texas, 235; Rev. Stats., arts. 2626, 2627.

In the case of *Gulf C. & S. F. Ry. Co. v. Cooper*, 33 Texas Civ. App., —, 77 S. W. Rep., 266, the Court of Civil Appeals of the First District held that, as the plaintiff agreed that the trial court might render judgment for one-half the amount recovered in favor of his attorney, a judgment so rendered was one of which the defendant could not complain. Without expressing an opinion as to the propriety or correctness of that decision, it is sufficient to say that the facts of this case do not bring it within the scope of it. We consider it the duty of this court to protect the rights of the minors, regardless of whether the matter affects appellant or not. Appellant, however, did not attempt to have the judgment corrected in the lower court and will not be permitted to profit in the matter of costs by the reformation of the judgment.

The judgment of the trial court will be set aside, and judgment here rendered in accordance with the verdict.

*Reformed and rendered.*

Writ of error refused.



## AMANDA M. ELLIS, EXECUTRIX, v. HOWARD SMITH COMPANY.

Decided April 20, 1904.

**1.—Defective Pleading—Verdict Curing.**

A verdict will cure defective pleading except where there is a total omission to state a cause of action.

**2.—Practice on Appeal—Executrix—Agent—Presumption.**

In the absence of a statement of facts, proof that an executrix of an estate authorized her son as agent to make contracts or purchase property in the furtherance of the business of such estate under authority of the will, or ratified his acts after they were done, will be presumed, though defectively averred or omitted in the pleading of one suing upon a note or contract made by such agent of the executrix.

Error to the District Court of Harris. Tried below before Hon. Chas. E. Ashe.

*James C. Baldwin*, for plaintiff in error.

*R. W. Franklin* and *H. F. Ring*, for defendant in error.

NEILL, ASSOCIATE JUSTICE.—This suit was brought by defendant in error, a private corporation, chartered under the laws of this State, against plaintiff in error, Amanda M. Ellis, as independent executrix of the estate of L. A. Ellis, deceased, to recover the sum of \$744.01, besides interest and attorney's fees, upon a promissory note, and the further sum of \$381.50 alleged to be due upon a certain contract described in defendant in error's original petition, and to foreclose a mortgage on certain property, sold by defendant in error to plaintiff in error, for which the amounts due on the note and contract are part of the purchase money.

It was alleged in defendant in error's original petition, upon which the case was tried, that the business of the estate of plaintiff in error's testator was carried on in the name of L. A. Ellis at and prior to the time when the contract was made and the note executed, and that they were made and executed in such name by plaintiff in error acting through her son, C. G. Ellis, as her agent and attorney in fact with full power and authority from her, as executrix of said estate, to act and represent the estate in all matters pertaining thereto in Fort Bend County, Texas. It also appears from the averments in defendant in error's petition that at the time the property was purchased, for which the note and contract sued on were made, the estate of plaintiff in error's testator had and was carrying on a business in Fort Bend County, Texas, and that the property was purchased for and used for the benefit of the estate in carrying on and operating such business.

The plaintiff in error answered by a general demurrer, which was not presented to the court, and a general denial. Her answer in no way traversed the allegations that the contract and note sued on were made by her as executrix, through her authorized agent, or that they were



made and executed for property purchased by her as executrix from defendant in error for the benefit of the estate of her testator, and actually used and operated in carrying on the business of such estate.

The case was tried before a jury, who, in obedience to a peremptory instruction from the court, returned a verdict in favor of defendant in error for the amount sued on, and establishing the alleged mortgage lien.

There is no statement of facts in the record, nor does it appear from it that any objection was made, either by motion for a new trial or in arrest of judgment, to the verdict or judgment and decree thereon entered.

The only assignment of error is this: "The trial court erred in rendering judgment for plaintiff in any amount, for the reason its petition was wholly insufficient to sustain a judgment against the executrix and estate represented by her for any sum whatever."

If it should be conceded that the petition of defendant in error would have been held bad on demurrer, no demurrer having been interposed, if defective at all, the defects were such as, in our opinion, were cured by the verdict. A verdict will not only aid a defective allegation, but it extends sometimes even to cure an omission altogether to make a necessary allegation. Where there are defects or imperfections in the pleading, yet the issue joined is such as necessarily required on the trial the proof of facts defectively or imperfectly stated, or even omitted, and without which it is not reasonable to presume that a jury would have given a verdict for the party, such deficiency is cured by the verdict. *Hill v. Ragland* (Ky.), 70 S. W. Rep., 637, and authorities cited; *Dunneke v. Beyer* (Ky.), 79 S. W. Rep., 209. The court will, after a verdict, presume or intend that the particular matter which appears to be defective or imperfectly stated or omitted in the pleading, was duly proved at the trial, and such intendment must arise not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given. On the one hand, the particular thing which is presumed to have been proved must always be such as to be implied from the *allegations on the record, by fair and reasonable intendment*. And on the other hand, a verdict for the party in whose favor such intendment is made is indispensable necessary, for it is in consequence of such verdict, and in order to support it, that the court is induced to put a liberal construction upon the allegations in the record. *Chitty on Plead.*, 673. The principle that a defective pleading is cured by the verdict is elementary and obtains in this State, as is illustrated by *Phelps v. Brackett*, 24 Texas, 236; *Tillman v. Fletcher*, 78 Texas, 673; *Salinas v. Wright*, 11 Texas, 572; *Denison v. League*, 16 Texas, 405; *Veal v. Fortson*, 57 Texas, 487. It is only where there is a total omission to state a cause of action or some fact essential to the cause of action has been wholly omitted, that a verdict will not cure the defect in the pleading.

When we apply these elementary principles to this case it will be



made to appear beyond question that the assignment of error does not present the matter fatal to the judgment.

It appears from the allegations in the original petition of defendant in error that there was a business of the estate of plaintiff in error's testator that she was carrying on, and it may be that it was shown upon the trial of the case that the testator by his will expressly authorized her to carry on such business, and that in order to enable her to successfully do so, he expressly empowered her to appoint their son, C. G. Ellis, as her agent and attorney in fact, with authority to act in and represent the estate in all matters pertaining to the business of the estate in Fort Bend County, and to that end with power to purchase for and bind the estate in all matters necessary to properly manage the business of the estate in that county. Or, if such authority were not expressly given by the will, that having elected to carry on the business of the estate as independent executrix, it was necessary for her to employ C. G. Ellis as her agent to conduct and manage such business of the estate, and as incidental to such employment, to authorize him for the benefit of the estate to make such contracts binding her as executrix as are the basis of defendant in error's right to recover against her, as such executrix, in this case, and that she did so employ and authorize him as her agent, and that through him, as such agent, she contracted, for the estate, the debt sued on. Or, if the evidence failed to show that C. G. Ellis was authorized by her to purchase the property for which the contract and note sued on were executed, it may have shown that having purchased the property, it was for the benefit of the estate in carrying on the business, and that she, as executrix, with full knowledge of all the facts, ratified his acts in making such purchase by retaining and using the property, and obligating the estate to pay the purchase money evidenced by such contract and note.

As independent executrix plaintiff in error had the power to do, without an order of the county court, every act which an executor administering an estate under control of the court could do with such order. *Dwyer v. Kalteyer*, 68 Texas, 554. Therefore, in the absence of a statement of facts, it will be presumed that the proof of such facts, though defectively and imperfectly averred in defendant in error's petition, or even omitted, without which it is not reasonable to presume the jury would have given a verdict for plaintiff, was made.

The judgment of the District Court is affirmed.

*Affirmed.*

Writ of error refused.



## R. P. GOUHENOUR V. A. L. ANDERSON ET AL.

Decided April 23, 1904.

**1.—Mandamus to Compel Approval of Official Bond of County Judge.**

The approval of the official bond of the county judge by the commissioners court is a matter involving the exercise of judicial discretion, and mandamus does not lie to control that discretion.

**2.—Same—Action May Be Compelled, When.**

Mandamus will lie, however, to compel the court to take action on a bond tendered to it, by either approving or rejecting it; and arbitrary action on the part of the court, whether from caprice or bad motive, is not the exercise of judicial discretion.

**3.—Same—Arbitrary Caprice—Issue Raised.**

Where in an action by mandamus against the commissioners court it was shown that the county judge tendered his official bond to the court for approval, and the court entered an order neither in terms approving nor rejecting the bond, but directing that the judge be cited to appear before the court at a date named to make bond, and at such designated date no meeting of the court was held, the evidence was such as to require the submission of the issue of whether or not the court passed upon the bond tendered, or arbitrarily postponed action thereon through a desire to oust relator from his office.

**4.—Same—Necessary New Parties.**

Where, before the hearing of the mandamus, the commissioners court had declared the office of county judge vacant because of failure on the part of relator to give an acceptable bond, and a new judge had been appointed who had received the resignations of a majority of the commissioners and appointed new ones in their stead, such new judge, and perhaps also the new commissioners, should have been made parties to the action, and the trial court should have refused to proceed further until this was done.

**5.—Same—Costs of Appeal—Reversal.**

The judgment being reversed because of the failure to make new parties below, appellant (the relator) will not be taxed with the costs of appeal, on the ground that he took no steps to have new parties made, where appellees urged upon the trial court the view that their resignations put an end to the controversy and entitled them to have the suit abated, and the reversal is also predicated in part on error in the charge in failing to submit a material issue raised by the evidence.

Appeal from the District Court of Potter. Tried below before Hon. Ira Webster.

*Reeder & Cooper*, for appellant.

*Browning, Madden & Trulove*, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—April 7, 1903, appellant, who was county judge of Moore County, Texas, was notified that two of the sureties on his official bonds had made application to be relieved of further liability. April 13, 1903, he submitted to the commissioners court of said county new bonds, which were not approved, if indeed they were not rejected, as will be seen from the following order, especially when read in the light of the oral testimony: "April 13, 1903. It is ordered by the court that R. P. Gouhenour be cited to appear before the court on Monday, the 27th day of April, 1903, to make a new bond as county judge, county commissioner and county superintendent



of public instruction, his present bond having become insufficient on account of a petition filed in the court on the 7th day of April, in which J. M. Terrell and H. A. Beauchamp asked to be relieved as sureties on said bond." No other bonds were offered by appellant, and no meeting of the commissioners court was held at the time appointed in this order. April 24, 1903, this action for mandamus was brought by appellant against the appellees as county commissioners of Moore County, to compel the approval of the bonds submitted to them April 13, 1903.

In one paragraph of the petition for mandamus it was charged that they had refused and failed to approve or disapprove said bonds. In the next paragraph it was charged that knowing the bonds to be sufficient both in form and as to the sureties, they had willfully and corruptly failed and refused to approve them for the fraudulent purpose of ousting appellant from office. Appellees answered, denying the charge of fraud, and pleading that after duly considering the bonds they had, in the exercise of the discretion given them by law, decided them to be insufficient both as to form and sureties, and by the order above quoted intended to disapprove them. The answer contained the further allegation that, at a meeting of the commissioners court held on the 9th day of May, 1903, the office of county judge of Moore County was declared to be vacant by reason of appellant's failure to give new bonds within the time prescribed by law, and one W. M. Jeter was appointed to fill the vacancy, who qualified, was commissioned by the Governor, and took possession of the office, after which three of the appellees, one at a time and in rapid succession, tendered their resignations, which were promptly accepted by Judge Jeter, who also appointed their successors, each of whom gave bond and took the oath of office and entered on the discharge of its duties.

The case was tried in the District Court of Potter County on change of venue, and resulted in a verdict and judgment for appellees under peremptory instructions.

The evidence was not such, on the controverted issue as to whether the commissioners court in the exercise of judicial discretion had rejected the bonds, as to warrant the court in withdrawing that issue from the jury. While there was evidence to the contrary, there was at least some evidence tending to prove that the commissioners court did not pass upon but arbitrarily postponed action on the bonds, and that at least a majority of the commissioners, out of a desire to oust appellant from office, did not intend to approve any bonds he might offer. We understand the law to be that the approval of an official bond involves the exercise of judicial discretion, and that mandamus does not lie to control or revise that discretion, but that it does lie to compel action on the part of those empowered to exercise the discretion, and that arbitrary action, whether from caprice or other bad motive, is not the exercise of judicial discretion. At the same time, if the commissioners really considered the sufficiency of the bonds tendered and rejected them



because they deemed them insufficient, they could not be compelled to again consider them, much less to approve them, merely because some or all of the commissioners may have been influenced by improper motives. Whether or not they had so acted was a controverted issue of fact which, with the necessary parties before the court, appellant was entitled to have submitted to the jury, unless the subsequent conduct of the commissioners in appointing another county judge and then resigning had the effect of depriving him of that right. If the commissioners really considered and rejected as insufficient the bonds tendered by appellant and he failed to tender other and sufficient bonds within the time prescribed by law, a vacancy was created in the office of the county judge which they were authorized to fill. *State v. Box*, 2 Texas Law Journal, 946, 78 S. W. Rep., 982, and particularly the case of *Flatlan v. State*, 56 Texas, 93, there cited. But whether they were authorized to do so or not, a new county judge was appointed who qualified and took possession of the office, and the commissioners did in fact resign, provided he had the power to accept their resignations. Appellant was thus left in a position where he needed something more than a writ of mandamus against the alleged recalcitrant commissioners. He had in fact lost his office, and that raised a new and paramount issue. His remedy then was to make Judge Jeter a party defendant, and probably also the new commissioners, and the court should have refused to proceed further unless this was done, but was not warranted in instructing the jury to return a verdict against appellant on the merits. *Nelson v. Edwards*, 55 Texas, 390, and case there cited.

As to the effect of the resignation of county commissioners on a mandamus proceeding, see *County Commissioners v. Sellew*, 99 U. S., Book 25 (L. Ed.), 333, and *Murphy v. Utter*, 186 U. S., Book 46 (L. Ed.), 1074.

For the error in the charge the judgment is reversed and the cause remanded.

*Reversed and remanded.*

ON MOTION FOR REHEARING AND TO TAX COSTS OF APPEAL AGAINST APPELLANT.

We are urged to at least tax the costs of appeal against appellant on the ground that his failure to make necessary parties was the cause of the appeal, that is, was the cause of the result of which he complains on appeal. If we could say from the record that it was, the motion to that extent ought perhaps to be sustained, since we might then treat the error of instructing a verdict against appellant on the merits instead of dismissing the suit for want of necessary parties as an inadvertent one which he took no steps to correct in the court below and failed to distinctly present even in this court. *Watkins v. Junker*, 90 Texas, 584; *Wetmore v. Woodhouse*, 10 Texas, 33; *Helen v. Weaver*, 69 Texas, 145; *Lee v. Welborne*, 71 Texas, 502; *Pearce v. Tootle*, 75 Texas, 150;



Converse v. Langshaw, 81 Texas, 281; Friedman v. Payne, 35 S. W. Rep., 47; Arnold v. Penn, 11 Texas Civ. App., 325, 32 S. W. Rep., 353; Moore v. Waco Assn., 19 Texas Civ. App., 68, 45 S. W. Rep., 974; Montrose v. Bank, 23 S. W. Rep., 709; Burkitt v. Levyman, 35 S. W. Rep., 421; Garza v. Hammond, 39 S. W. Rep., 610.

But a re-examination of the record has failed to convince us that appellant alone should be charged with the error. While he seems to have entertained and urged the view that he was entitled to ignore his successor in office and the commissioners appointed by him, and undertook to proceed without them, appellees seem to have entertained and urged upon the court the view that their resignations put an end to the controversy and entitled them to have the suit abated. The court concluded, as expressed in the peremptory instruction, "should the verdict of the jury be in favor of plaintiff, under the pleadings and evidence and law of the case, the court would not be authorized to grant the remedy asked." The case therefore seems to have been tried and disposed of without reference to the question of necessary parties, the court doubtless holding in accordance with the contention of the appellees, that because of the resignations of the appellees appellant was no longer entitled to mandamus. In this we thought on the original hearing and still think the court erred. While numerous cases may be found in which officers, by resigning, have defeated mandamus proceedings, we are of opinion that the weight of authority and sound principles sustain the contention of appellant that when the proceeding is against a body like a commissioners court it will not be defeated by the resignation of any or all of its members. Whether the succeeding members should be cited and thus made formal parties to the proceeding, or be treated as already before the court, is a question on which the authorities do not seem to be altogether satisfactory, but we are of opinion that where the body proceeded against, like the commissioners court of Texas, is not a corporate body, such members should be cited. It does not follow, however, from this that the resigning members complained against could thus relieve themselves of all liability, since appellant would be entitled to keep them before the court to abide the final judgment as to costs at least, the rule being, "as between public officers and their successors costs are to be allowed against the incumbent of the office who was guilty of the default which gave rise to the mandamus proceedings." 13 Enc. of Pl. and Prac., 820. As to the propriety of making the county judge in the actual possession of the office a party, we entertain no sort of doubt, especially in view of the complications that might arise by proceeding without him, and this view accords with the Texas authorities. In addition to what is cited in the original opinion, see Gaal v. Townsend, 77 Texas, 464, cited in the motion. But the authorities outside of Texas seem to leave it doubtful whether he would be a necessary party.

We are therefore of opinion that we would not be warranted under the circumstances in taxing the costs of appeal against the appellant,



the judgment having been reversed, not for want of necessary parties, but because the court instructed a verdict on the merits when the evidence as well as the pleadings clearly raised a controverted issue of fact, and this ruling being covered by the assignments.

We see no such difficulties in the way of making new parties because of the change of venue as appellees seem to have found. The privilege of being sued in the county of one's residence is a statutory and valuable one, but is nothing more than a privilege, and is subordinated by the statute itself to the right to join necessary parties.

The motion is overruled.

*Overruled.*



## WESTERN UNION TELEGRAPH COMPANY v. J. D. RIDENOUR ET AL.

Decided April 23, 1904.

**1.—Telegrams—Death Message—Issue Raised by Evidence.**

Where the testimony was positive to the effect that if the first of two undelivered messages had been delivered plaintiff's wife would have gone on the next train to her sister's bedside, and there is nothing in the record to indicate that she would have done otherwise if the second message had been delivered, except the bare fact that she and her husband failed to state what she would have done in that contingency—such opinion being evidently due to the fact that no such question was propounded—and their whole testimony went to show that she would have gone, the court was justified in submitting to the jury the issue of whether or not she would have gone.

**2.—Same—Assignment of Error Not Specific.**

An assignment of error that the court erred in submitting to the jury as a basis of recovery the failure of defendant to deliver the second message does not raise the question of whether or not the court erred in not restricting the extent of recovery sought on that basis to the injury sustained by plaintiff's wife in being deprived of being present at her sister's funeral—the evidence establishing clearly that she could not have reached there prior to the sister's death.

Appeal from the District Court of Wichita. Tried below before Hon. A. H. Carrigan.

*L. H. Mathis, Huff, Barwise & Huff, and Geo. H. Fearons*, for appellant.

*Montgomery & Hughes*, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—Two messages were sent over appellant's wires from Duncan, I. T., to Ladonia, Texas, one on the 10th and the other on the 11th of February, 1901; but neither of them was delivered. If the message of the 10th had been delivered within a reasonable time it would have informed the appellees, J. D. Ridenour and wife, of the serious illness of May Clark, who was a sister to the wife of J. D. Ridenour, and Mrs. Ridenour would have gone to the bedside of her sister and been with her in her last sickness. If the message of the 11th had been delivered it would have enabled Mrs. Ridenour to attend the funeral, but it was sent too late for her to have reached her sister before she died. The failures of appellant to deliver these messages were made grounds of recovery in separate counts, and the evidence warranted a finding of negligence and damage as alleged except that it did not warrant a finding that the failure to deliver the second message deprived Mrs. Ridenour of seeing her sister alive.

In submitting the issues the court gave the following instruction: "If you find and believe from the testimony that on or about February 10 and 11, 1901, the defendant received at its office in Duncan, I. T., either of the telegraphic messages as described in the plaintiff's first amended original petition, and that said messages or either of them were received by defendant for transmission and delivery for hire to the plaintiff at Ladonia, Texas, and that defendant failed to promptly



transmit and deliver said message to the plaintiff at Ladonia, Texas, and that in such failure, if any, the defendant was guilty of negligence as defined in the first and second paragraphs of this charge, and that if said message had been promptly transmitted and delivered to plaintiff, plaintiff's wife, Mrs. Clemmie Ridenour, could and would have gone from Ladonia, Texas, to Duncan, I. T., on the first train after said message could have been promptly delivered, and that she could and would have been present during the life of her sister, May Clark, during the last hours of her life, and was prevented from being at the burial of her said sister, May Clark, and that she, the plaintiff, Clemmie Ridenour, has sustained damages and suffered injury in consequence of such negligence, if any, upon the part of defendant, you will find for the plaintiff."

To this charge, as well as to other paragraphs less objectionable, and to the court's refusal to instruct the jury not to consider the failure to deliver the second message as a basis of recovery, error is assigned on the ground that the evidence did not warrant the submission of that issue. It is contended that if Mrs. Ridenour had taken the first train out of Ladonia after the second message was sent, she could not have reached her sister prior to her death, and this contention is sustained by the evidence; for her sister died at her father's house, some twelve miles from Duncan, in the country, about the time that train was due at Duncan. But, as already indicated, she could have reached her father's house in time for the funeral; so that the court did not err in refusing to withdraw the issue entirely from the jury, unless the further contention be sustained that the evidence utterly failed to show that Mrs. Ridenour would have gone if she had received the second message in time. We think it is fairly to be inferred from the evidence that she would. The testimony was positive to the effect that if the first message had been delivered she would have gone on the next train, and there is nothing in the record to indicate that she would have done otherwise if the second message had been delivered, except the bare fact that she and her husband failed to state what she would have done in that contingency, which omission was evidently due to the fact that no such question was propounded. Their whole testimony went to show that she would have gone.

The charge quoted seems open to the criticism, however, that it did not restrict the damages arising from the failure to deliver the second message to the mental anguish suffered by Mrs. Ridenour because she had been deprived of attending the funeral of her sister, but neither in the assignments complaining of this charge nor in the proposition and statement submitted under them is this objection specifically made. These assignments (1 and 2) are grouped with two others in the brief, and the only question thus submitted for our determination is whether the court erred in submitting to the jury as a basis of recovery the failure of appellant to deliver the second message, which is not pre-



cisely the same as whether the court erred in not restricting the extent of recovery sought on that basis, as explained above. The error, therefore, not being distinctly specified, is waived. If it be said this is technical, we reply, so is the objection, and so also is the rule itself which requires a judgment to be reversed merely because the court submits an issue not raised by the evidence. While the rule is well established, it proceeds upon the assumption that the jury is so wanting in intelligence and common sense as to be liable to find a fact without any evidence to base the finding on, merely because the judge submits the inquiry to them.

The definition of negligence quoted and criticised in the brief differs from that found in the transcript, and as there written is not subject to objection. Besides, as quoted in the brief the clause applicable to the facts of this case is correct.

The verdict is sustained by the evidence, and the amount thereof, \$750, is not complained of.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



## W. B. TOLLESON V. B. E. WAGNER.

Decided April 23, 1904.

**1.—Estoppel—School Land—Mandamus Suit in Supreme Court.**

Plaintiff sued out a writ of mandamus in the Supreme Court to compel the Commissioner of the General Land Office to award him the section of school land here in controversy, and the judgment of that court determined against him the principal issue of law involved in his claim against the defendant here for the land. Plaintiff there sued in the district court in trespass to try title to recover the land, and sought to controvert the facts which he had admitted in the application for mandamus in order to obtain the ruling of the Supreme Court on the question there presented. Held, that he was not entitled to have the same matters litigated twice, and was estopped from controverting the facts which he had alleged or accepted as undisputed in order to obtain the ruling in the mandamus case.

**2.—Evidence—Certified Copies—Archives of General Land Office.**

Where transfers of school lands were recorded in the proper counties and then filed in the General Land Office, and certified copies from the county records were offered in evidence, the fact that the originals were archives of the Land Office sufficiently accounted for their nonproduction.

Appeal from the District Court of Scurry. Tried below before Hon. H. R. Jones.

*James & Yeiser*, for appellant.

*Ed. J. Hamner*, for appellee.

STEPHENS, ASSOCIATE JUSTICE.—This appeal is from a judgment in appellee's favor in an action of trespass to try title brought by him against appellant to recover the same section of school land which appellant had failed to have awarded to him in the mandamus proceeding instituted in the Supreme Court against the Commissioner of the General Land Office and appellee. See *Tolleson v. Rogan*, 96 Texas, 424, 73 S. W. Rep., 520.

In addition to the usual allegations in trespass to try title, appellee set out the pleadings and judgment in the mandamus suit as a ground of recovery; from which it appears that the titles of the respective parties were the same as in this action, the only difference being that in the mandamus suit the facts alleged as the basis of the respective titles were not controverted. In defense of this action appellant undertook to controvert not only the issues of law passed upon in the mandamus case, but also the facts there treated as undisputed. The district court seems to have decided the issues of fact as well as of law against him, and numerous errors are assigned to the judgment, which was rendered without a verdict or findings of fact.

It is a sufficient answer to all the assignments of error that appellant was not entitled to have the same matters litigated twice, unless the Supreme Court was without jurisdiction in holding, as was done in the mandamus suit, that Wagner was entitled to the award made to him, and that the applications of Tolleson were properly rejected. True, the petition for mandamus, as we read the record and understand the



law, fails to show or to attempt to show any good reason why adequate relief could not have been had in an ordinary action of trespass to try title in the district court. Indeed, the petition does not even intimate, much less allege facts tending to show, that the Commissioner of the General Land Office would not respect a final judgment in such an action, and we know of nothing in the history of that office, for the last decade or so at least, to warrant such an intimation. It seems to us, therefore, that Tolleson could have had no just ground of complaint if the Supreme Court, when applied to as a court of original jurisdiction to litigate the titles in question, had dismissed his application for want of jurisdiction, the real issue evidently being between Tolleson and Wagner, and not between Tolleson and the Land Commissioner, who has so uniformly conformed his action to the final judgments of the regular tribunals established to try equitable as well as legal titles to land. Evidently the purpose of the mandamus suit was to have a speedy and authoritative determination by the Supreme Court of the issues of title involved, as seems to have become the common practice in school land litigation, rather than to compel a recalcitrant officer to discharge a plain duty. Thus, it seems, the long recognized jurisdiction of the district court over a large volume of land litigation is being practically transferred to the Supreme Court as a court of first instance, because of its power to grant the extraordinary writ of mandamus; presenting in this instance the anomaly of first a trial in the Supreme Court and then a trial in the district court of the same issues of title between the same parties, which could hardly have been contemplated as a legal possibility of our judicial system.

But the power was undoubtedly conferred on the Supreme Court of determining whether it would entertain jurisdiction of an application for mandamus; that is, whether in a given case the ordinary legal remedy would be adequate, and that question was presumptively determined in this instance in favor of jurisdiction. Appellant was therefore not only concluded by the decision of the court of his own selection on the issue of jurisdiction, but was also estopped from controverting facts which he had alleged or accepted as undisputed in order to obtain a very important ruling of that court on the issues of law arising on such facts.

Probably one assignment is not covered by the above conclusion, and it relates to the admission in evidence of certified copies from the General Land Office of transfers of appellee's home section on file in that office. These transfers had been duly recorded in the county where the land lies before they were filed in the General Land Office, and had been filed with the papers of this case as required by statute in case of recorded deeds. The fact that they had become archives of the land office was sufficient evidence of appellee's inability to produce the originals to warrant the admission of certified copies in evidence.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



## J. P. McCLALLAHAN ET AL. V. J. W. MARSHALL ET AL.

Decided April 23, 1904.

**1.—Public Lands—Homestead Donation—Proof of Occupancy—Cancellation of Patent.**

A homestead donation survey of public land, of 112 acres, was made for M. on March 21, 1877, and was afterwards reduced by corrected surveys to 91 acres. His proof of three years occupancy was of a tract of 143 acres, surveyed for him November 2, 1876, and such proof in no way showed the land surveyed on March 21, 1877, to be the land on which M.'s settlement was made, but patent was issued to M.'s heirs for the land as described in the proof of occupancy. After M. had left the land and his improvements thereon had rotted down, C. applied for a homestead donation survey which included the land, and after due proof of three years occupancy it was patented to him. Held, in a contest of title between C. and the heirs of M., that C. was entitled to judgment for the land, and to have the adverse prior patent canceled, since proper proof of occupancy was a condition precedent to the acquisition of title by M. and the issuance of patent therefor.

**2.—Same—Presumption Arising from Patent Overcome.**

While the patent issued to the heirs of M. furnished evidence that all steps required by law to authorize its issuance had been taken, such presumption arising therefrom could be rebutted and overcome by positive proof that such steps had not been taken.

Appeal from the District Court of Hopkins. Tried below before Hon. H. C. Connor.

*Frank E. Scott* and *R. B. Keasler*, for appellants.

*Crosby & Dinsmore*, for appellees.

TALBOT, ASSOCIATE JUSTICE.—This is an action of trespass to try title to about 91¼ acres of land situated in Hopkins County, Texas. Appellants claim the land as the heirs of Spicer McClallahan, deceased, and brought this suit to recover the same and to cancel a patent issued to appellee J. E. R. Campbell therefor on the 9th day of October, 1900. Appellants claim that their ancestor, Spicer McClallahan, settled on and pre-empted the land as a homestead in 1875, and that a patent issued to them therefor in July, 1901. Appellees Willis, Lindley, and Campbell disclaimed as to title and possession, and in so far as appellants sought to recover rents against them pleaded a general denial and the statute of limitation of two years.

Appellee J. W. Marshall pleaded not guilty, the statute of limitation of two and three years, improvements in good faith, and sought a cancellation of a patent issued to Spicer McClallahan or his heirs for the land in controversy on the 24th day of July, 1901. A trial was had before the court without the intervention of a jury and judgment rendered for appellee Marshall for the land and for a cancellation of the McClallahan patent. Judgment was rendered for appellants for the land as against the appellees Willis, Lindley and Campbell on their disclaimers, and in favor of said last named appellees upon the issue of rents, and for costs. Motion for new trial having been overruled, appellants appealed.



*Conclusions of Fact.*—On the 1st day of November, 1875, Spicer McClallahan settled on the land in controversy as vacant public domain, and on April 25, 1876, made application to the district surveyor of the Hopkins County district, under oath, to have the same surveyed for him as the head of a family, for homestead purposes. On March 21, 1877, H. C. Barker, then surveyor of Hopkins County, made a survey of land for Spicer McClallahan under his application for homestead donation. This survey contained  $112\frac{1}{2}$  acres, and included about twenty acres of the land now in controversy, and the field notes and application for such survey were duly recorded in the surveyor's records in Hopkins County. Spicer McClallahan built a cabin, dug a well, cleared and fenced a few acres of land, set out some fruit trees, and made it his home. These improvements were not on the  $112\frac{1}{2}$  acres of land surveyed by H. C. Barker, but they were in fact about a half mile south of the south line of such survey. The field notes of the Barker survey were filed with the Commissioner of the General Land Office June 24, 1877, and found to be in conflict with patented surveys of R. N. Booth and Jos. Zennuga. On November 9, 1879, and June 27, 1882, respectively, Spicer McClallahan had corrected surveys made by J. L. Gilbert, surveyor of Hopkins County, both of which covered the land in controversy, and included within their boundaries the improvements made by McClallahan in 1875. These corrected surveys made by Gilbert reduced the number of acres of the land to  $91\frac{1}{4}$ , and is the land described in appellants' petition. Said corrected surveys were sworn to by Gilbert and recorded in a book kept for that purpose in his office in Hopkins County, Texas, and were filed with the Commissioner of the General Land Office on July 1, 1882.

The only proof of occupancy and improvements made, so far as shown by the record before us, is that Spicer McClallahan in the name of Spicer McCleahan—the latter being an incorrect spelling of his name—was a bona fide settler upon 143 acres of vacant public land situated in Hopkins County, Texas, and surveyed for him on the 2d day of November, 1875, by H. C. Barker, a surveyor of said county, and that he had improved and occupied the same as a homestead for a period of three consecutive years, beginning on the first day of November, 1875. This proof was made by the affidavit of Spicer McCleahan and John and Elisha Clapp, sworn to by them before J. M. Ashcroft, clerk of the District Court of Hopkins County, on the 23d day of November, 1878; and the said Ashcroft, as such clerk, certifies "that John Clapp and Elisha Clapp are credible and trustworthy citizens" of Hopkins County. The survey for Spicer McClallahan under which appellants claim, made by H. C. Barker, was a tract of  $112\frac{1}{2}$  acres, surveyed March 21, 1877. The proof of occupancy and improvements in no way identifies or shows the land surveyed on March 21, 1877, to be the land on which the settlement of McClallahan was made. The proof of McClallahan as stated, and no other, was recorded in the surveyor's office of Hopkins County, Texas, and was the only proof



of his occupancy filed with the Commissioner of the General Land Office. Such proof was filed in the General Land Office December 2, 1878, and on the same day a fee of \$5 was received by the Commissioner in a letter written by E. Lindley to pay for issuance of patent to McClallahan. Spicer McClallahan lived on the land in controversy, and at the place where his improvements were made, continuously from the time he settled on same in 1875 until his death in 1885. At the time he settled on the land and during his occupancy thereof he had a wife and children living in Fannin County, Texas. Neither his wife nor children ever lived with him on the land. There is no evidence that he and his wife were divorced, but he left her some time between the years 1867 and 1870, and went into Wood County, Texas, and afterwards into Hopkins County, Texas. While living on the land in controversy, Spicer McClallahan visited his family in Fannin County several times and gave them some money. His wife died after he died, and the appellants in this suit are their only surviving heirs. In the documents and records pertaining to Spicer McClallahan's settlement and occupancy of land in Hopkins County mentioned, his name is spelled in different ways, but the evidence sufficiently identifies him as appellants' ancestor, and the person named in and connected with said surveys, etc. After McClallahan died no one lived on the land for more than ten years, and the improvements put thereon by him rotted down and disappeared. Appellants never rendered the land in controversy for taxes, nor paid taxes thereon. A patent was issued to Spicer McClallahan, granting him or his heirs the land in controversy, on the 24th day of July, 1901.

In April, 1895, J. E. R. Campbell was the head of the family, and at that time he made application for pre-emption as a head of a family, and caused a survey of the land in controversy to be made for him under his homestead donation claim, by J. L. Gilbert, county surveyor of Hopkins County, on the 1st day of April, 1895. This survey covered the land in controversy, and at that time the improvements put on the land by Spicer McClallahan had rotted down. These field notes and application were sent to the General Land Office. In the fall of 1895, after said survey, J. E. R. Campbell moved his family onto the land in controversy, erected a dwelling-house and outhouses, put a part in cultivation, occupied it and cultivated it as his home. The field notes of the Campbell survey were sent back for correction to be made by J. L. Gilbert, county surveyor of Hopkins County, on March 1, 1896. The field notes were again returned, and J. E. R. Campbell caused a resurvey and correction thereof to be made by Joseph Brashear, county surveyor of Hopkins County, on the 8th day of October, 1899. On October 9, 1900, a patent was issued for the land in controversy from the General Land Office, upon the field notes and survey of Joseph Brashear, above referred to, to J. E. R. Campbell.

J. E. R. Campbell and wife, by their general warranty deeds dated December 13, 1900, conveyed the land in controversy to the defendant,



J. W. Marshall. J. W. Marshall went into possession through tenants immediately upon receiving the conveyance to him from Campbell, paid for the land, and he and Campbell, through whom he claims, have been continuously in possession thereof since the fall of 1895. J. W. Marshall put some improvements on the land after he went into possession. J. E. R. Campbell knew at the time he filed on the land that Spicer McClallahan had lived on the south end of it and had tried to get a patent for it.

*Conclusions of Law.*—We are of opinion that the judgment of the court below should be affirmed. It will be seen from our conclusions of fact that an effort was made by Spicer McClallahan, through whom appellants claim, to settle on vacant public domain in Hopkins County by virtue of the homestead donation laws then in force. That he failed to comply with such laws and acquired no right to the land in controversy, seems clearly apparent from the record before us. If it be conceded that Spicer McClallahan came within that class of persons to whom homestead donations were extended, and that he settled on the land in controversy in good faith and made improvements thereon as contemplated by law, still the evidence shows a failure on his part to comply with one of the conditions precedent to the acquisition of a vested right in the land sought to be recovered. The several enactments of our Legislature prescribing the terms and conditions upon which an actual settler may acquire a homestead upon vacant public land make it an essential prerequisite to the issuance of a patent therefor that such settler shall have improved the land and occupied it for three years in good faith, and that such proof of such improvement and occupancy in good faith shall have been made by the sworn affidavit of such settler and of two disinterested and credible citizens of the county in which the land is situated. These affidavits and the credibility of said citizens must be certified to by the clerk of the district court and filed in the General Land Office. The proof of improvements and occupancy on the part of Spicer McClallahan, made by appellants, is insufficient to show a compliance with the provisions of the law in respect to the land in controversy, but, on the contrary, unquestionably establishes that the law was not complied with. The quantity of land settled on by Spicer McClallahan, as shown by his proof of occupancy, was 143 acres, and was surveyed for him on the 2d day of November, 1875. The survey under which his heirs claim in this suit was made March 21, 1877, and contained only  $112\frac{1}{2}$  acres, and reduced by corrected surveys to  $91\frac{1}{4}$  acres. There is nothing in the proof of occupancy to show that the tract of  $112\frac{1}{2}$  acres is a part of the 143 acres, and it is in nowise shown by such proof to be the land settled on and occupied by Spicer McClallahan.

In securing a homestead under the donation laws the settler was required, as a preliminary step, to make an application under oath to have his land surveyed, and he was required to state in such applica-



tion that he believed he had settled on vacant land. In passing upon this provision of the law in the case of Bledsoe v. Cains, 10 Texas, 460, under the Act of January 27, 1845, it was held, "that the affidavit was a necessary predicate of the survey is clear, and if the fact of such affidavit not having been made was established, it would destroy the validity of the survey." This view of the law was approved in the case of Miller v. Moss, 65 Texas, 181. By analogy and with as strong reason we think it may be said that the affidavits of Spicer McClallahan's occupancy and improvements of the land in controversy for three years from the date of his settlement thereon, was a condition precedent to the acquiring of title to and issuance of a patent for the land sued for; and the fact that such affidavits were not made and filed in the General Land Office defeats whatever right appellants might otherwise have had to recover, and authorized the cancellation of the patent issued to them on the 24th day of July, 1901.

It is true that the patent issued to Spicer McClallahan's heirs furnished presumptive evidence that all steps required by law to authorize its issuance had been taken, but such presumption arising therefrom was rebutted and overcome in this case by the positive proof made by appellants themselves that such steps had not been taken.

If the views expressed are correct, appellants can in no event recover, and whatever error is shown by their assignments becomes immaterial and need not be discussed. The judgment of the court below is affirmed.

*Affirmed.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v.  
SALLIE JONES ET AL.

Decided April 23, 1904.

**1.—Railroads—Injury to Employee—Charge—Pleading and Evidence.**

A charge that it is the duty of a railway company's servants who operate its engines along a portion of its track that is commonly used by its employees, or over and about which its employees commonly pass in the discharge of their duties, to exercise ordinary care in keeping a lookout to discover the presence of such employees on or in close proximity to the track at such point, and to use all means in their power consistent with the safety of the engine and its operatives, to stop the engine to prevent a collision with or injury to such employees,—held warranted by the pleading and evidence disclosed in the opinion, and to announce a correct principle.

**2.—Same—Duty to Stop Not Made Absolute.**

Such charge did not make it the absolute duty of those operating the engine to stop it on approaching a place in the track commonly used by the employees, but to use all means in their power to prevent injury to them.

**3.—Same—Assuming Deceased Not Guilty of Negligence.**

A charge held not to assume that the deceased was not guilty of negligence in slipping and falling and being in the railway track at the time he was injured,—the charge requiring the jury to believe that he was exercising ordinary care for his own safety at the time, and being followed by a special charge, given at defendant's request, instructing that the burden of proof was on plaintiffs to show that the deceased was free from negligence.

**4.—Same—Intoxication Precluding Recovery, When.**

The intoxication of the deceased at the time of the injury would not, of itself, preclude a recovery for causing his death, since, to have that effect, the intoxication must have contributed to or proximately caused his injuries. See charges held to correctly present that issue.

**5.—Same—Assumed Risk Must Be Pleaded.**

Where the defendant had not pleaded assumed risk, it was not error for the court to refuse to submit that issue to the jury.

**6.—Evidence—Res Gestae.**

Where deceased was run over by an engine, dying three hours afterwards, and within five minutes after the injury, and while he was still lying on the track, a conversation occurred between him and the man who was in charge of the engine as to why the latter did not see the deceased on the track in front of the engine when he could have seen him, such conversation was admissible as res gestae.

**7.—Same—Expert Evidence—Engineer.**

A witness who had had fourteen months' experience as an engineer was competent to testify as to the distance ahead at which one operating an engine can see an object on the track.

**8.—Verdict Held Not Excessive—Action for Death.**

A verdict for \$10,416, for negligently causing the death of a colored coal heaver, 32 years of age and earning \$45 per month, held large, but not so large as to show that it was the result of passion or prejudice on the part of the jury.

Appeal from the District Court of Hunt. Tried below before Hon. H. C. Connor.

*T. S. Miller and Perkins, Craddock & Wall, for appellant.*

*Bennett & Jones, for appellees.*

BOOKHOUT, ASSOCIATE JUSTICE.—On the 19th of March, 1903, Sallie Jones instituted this suit against the appellant for herself and in



behalf of her minor children, Annie, Pearline, Lennie and A. G., to recover damages on account of the death of Jack Jones, who was her husband, and the father of the said minor children. The defendant answered by a general demurrer, general denial and a special answer of contributory negligence in that the deceased, Jack Jones, was intoxicated at the time he was injured and killed, and that by reason of intoxication he stepped or fell immediately in front of the engine or fell underneath one or more of the wheels of the tender by the side thereof and was run over and killed. A trial resulted in a verdict and judgment for plaintiffs for \$10,416, and defendant appealed.

*Conclusions of Fact.*—For the purpose of coaling its engines in Greenville the appellant used a platform about fifteen feet wide and perhaps 100 or more feet long, and about the middle of this platform was situated a derrick or hoist operated by air which was supplied by the engine being coaled. The derrick consisted of three upright pieces on the platform, the center piece being designated as the crane, hoist or "horse." At the top of this hoist were arms extending in each direction, to which the buckets of coal were attached, and then the arms revolved so as to carry the coal from over the platform to the tender of the engine, where it was dumped. This coal platform was parallel with appellant's main track, which was situated just west of the platform. The air or lifting power was conveyed from the engine to the hoist by means of a hose which would be attached at one end to the train line hose at the rear end of the tender being coaled after the same was stopped at the proper place, and at the other end to a pipe running along the west side of the platform communicating with and constituting a part of the machinery of the hoist, said pipe extending equal distances on each side of the middle upright piece. If an engine were headed south the hose would be attached at the north end of this pipe, but if headed north it would be attached at the south end of the same. Just north of this platform was situated the sand house or place where the engines were supplied with sand; north of that a short distance was situated the inspector's office, and north of that across Henry Street was situated the flagman's shanty. The coal platform was three or four feet high, and it was about thirty steps, or ninety feet, from the sand house to the place where the engines were coaled. The hose would always be attached by one of the colored coal-heavers who worked on the platform.

C. B. Lyle was the hostler and in charge of defendant's engine No. 192. This engine and its tender was backed up from defendant's round-house, which was situated about 300 yards south of the coal chute, along appellant's main track by the coal chute to the sand house for the purpose of having the sand box filled. After it was sanded it was moved south over the same track to the coal chute to take coal. It was moving about two miles per hour and had its headlight burning. About this time Jack Jones, the deceased, who was on the platform of



the coal chute, jumped down by the side of the track to attach the hose to the tender. It was the duty of Jack Jones to attach this hose. There was coal on the ground by the side of the track and this caused him to slip and fall across the track. He was run over and injured, from which death resulted. In addition to the light furnished by the headlight of the engine, Jack Jones' lighted torch was sitting on the platform near where he jumped therefrom. There was also a burning torch hanging on the coal chute about as high as a man's head.

In deference to the verdict we find that the employes of defendant operating the engine did not use ordinary care to keep a lookout for persons on the track, and that in this respect they were negligent, and that such negligence was the proximate cause of the injuries to Jack Jones; that had a proper lookout been kept by said employes they could and should have discovered Jack Jones upon the track in time by the use of the means at their command to have stopped the engine and averted injuring him; and that Jack Jones was not guilty of contributory negligence, and by his death appellees have suffered damages in the amount found by the jury.

*Opinion.*—Complaint is made of the following paragraph of the charge of the court: "It is the duty of a railway company's servants who operate its engines along a portion of its track that is commonly used by its employes, or over and about which its employes commonly pass in the discharge of their duties, to exercise 'ordinary care' in keeping a lookout to discover the presence of such employes on or in close proximity to the track at such point, and to use all the means in their power, consistent with safety of the engine and its operatives, to stop the engine to prevent a collision with or injury to such employes."

The contention is that this charge is not warranted by the pleadings, and that there is no evidence that the deceased was ever in a position in close proximity to the track where he might have been seen by those on the engine, or where it would become the duty of those on the engine to see him and stop the engine. The petition did charge that the "agents and servants of appellant operating its engines at said point might reasonably and at all times anticipate or expect the presence of persons on said portion of said track, or in dangerous and perilous situation in close proximity thereto, and that appellant knew, or by the exercise of ordinary care could have known, that the operation of its engines at said point was attended with great peril and hazard to the lives and safety of its employes working in said yards, and on and around said coal chute."

C. B. Lyle, the hostler in charge of the engine, testified that "I knew the coalheavers worked there all the time. I knew that they had to get off of the platform to connect the hose. The coalheavers working there were bound to be there somewhere. I knew that they were in the habit of getting down just before the engine got there, just ahead of the engine."



The charge complained of announced a correct principle, and we think the issue presented was fairly raised, both by the pleadings and evidence.

Nor is this charge subject to the criticism that it makes it the duty of the operatives of the engine, when approaching at a place where the track is commonly used by the employes, to stop the engine in order to avoid injuring such employes. The only construction which the jury could have placed upon the charge was that it made it the duty of the operatives of the engine to use ordinary care to keep a lookout to discover employes of the railroad upon or in close proximity to the track, and if the employes were discovered in such position, to use all means in their power to prevent injury to them. It is not made the absolute duty of those operating the engine to stop it on approaching a place in the track commonly used by the employes.

The following charge is also assigned as error: "Now if you believe from the evidence, under the foregoing rules of law, that on February 11, 1902, Jack Jones was in the employ of the defendant, in its yards in Greenville as coalheaver; and if you believe on said date one of the defendant's engines was approaching on the main line on the west side of the coal chute from the north, at a low rate of speed, to wit, about two miles an hour, for the purpose of taking coal at the coal chute; and if you believe Jack Jones went to jump down from the platform of the coal chute to be ready to attach to said engine its air hose used in coal-ing engines; and if you believe in attempting to jump from said platform (if he did) he slipped and fell on the track in front of the engine; and if you believe in attempting to jump from said platform, if he was, he was in the discharge of his duties; and if you believe he was exercising ordinary care for his own safety; and if you believe that said engine ran over and killed the said Jack Jones; and if you believe the said Jack Jones was run over by said engine at a point on the defendant's track that was commonly used by the defendant's employes, or over and about which its employes commonly passed; and if you believe that the servants of the defendant in charge of said engine could, by the exercise of 'ordinary care' in keeping a lookout, have seen the said Jack Jones fall on said track, if he fell thereon, in time, by using the means in their power, to have prevented his injury and death; and if you believe that said servants failed to keep such lookout, that is, failed to keep such lookout to discover employes on or near the track, as persons of ordinary prudence would have kept under the same or similar circumstances; and if you believe their failure to keep such lookout (if they failed) was the proximate cause of Jack Jones being run over and killed, then you will find for the plaintiffs."

The criticism made to this charge is that it assumes that Jack Jones was not guilty of negligence in slipping and falling and being on appellant's track at the time he was injured, whereas his conduct in this respect was an important issue which should have been left to the determination of the jury. We are of the opinion that the main charge



does not assume that Jack Jones was not guilty of negligence in slipping and falling and being upon appellant's track.

This charge required the jury to believe that Jack Jones was exercising ordinary care for his own safety in attempting to jump from the platform. In this connection the court, at the request of defendant, instructed the jury as follows: "The burden of proof is upon the plaintiff to show from the surroundings and circumstances leading up to the accident what the deceased was doing, and that he was free from negligence, as that term is defined in the main charge of the court, and that the defendant's servants in charge of the locomotive were negligent as that term is defined in the main charge of the court, and that such negligence on the part of the servants was the proximate cause of the death of the deceased." The special charge quoted clearly requires the jury to find that deceased was free from negligence.

In its seventh assignment of error complaint is made of the following charge: "Or if you believe from the evidence that the said Jack Jones at the time of the accident was intoxicated, or in a state of intoxication; and if you believe that because of such intoxication he slipped and fell in front of or underneath one or more of the wheels of said engine; and if you believe that he was guilty of negligence in being intoxicated or in a state of intoxication (if you find he was) at said time and place; and if you believe such negligence, if any, caused or contributed to cause his injury and death, then, in that event, you will find for the defendant; but if you find that said Jack Jones was intoxicated or in a state of intoxication, that would not defeat a recovery unless you further believe that the same was negligence and that such negligence caused or contributed to cause the injury."

Appellant contends that the real issue for the determination of the jury was whether or not his intoxication caused him to do or fail to do anything which a man of ordinary care and prudence would have done or failed to do, and it was erroneous for the court by this charge to lead the jury away from such issue by instructing them that the intoxication of deceased would not defeat a recovery unless his intoxication was negligence.

The intoxication of Jack Jones, if he was intoxicated, in itself would not preclude a recovery by plaintiffs, but the same must have contributed to or proximately caused his injuries. The jury were told by this charge that if Jack Jones was intoxicated, or in a state of intoxication, such condition would not defeat a recovery unless they believed the same was negligence and caused or contributed to cause the injury. The jury could not have been misled by this charge. The court gave at the request of defendant on this issue the following special charge: "If you believe from the evidence that at the time of the accident Jack Jones was in a state of intoxication, and that such state of intoxication placed him in such a condition that he was unable, and failed, to exercise the caution and care required of him under the general instructions of the court heretofore given you; and if you further believe that by



reason of such condition he was injured, then in that event the plaintiffs can not recover."

We are of the opinion the charge complained of, when construed in connection with the special charge quoted, fairly submitted the issue of contributory negligence resulting from intoxication. The only negligence pleaded by appellant as constituting contributory negligence on his part was that arising from his intoxication, and the issue raised by this plea having been fairly submitted, and the charge further requiring the jury to find that Jack Jones was exercising ordinary care for his own safety in attempting to jump from the platform, there was no error in refusing the special charge number 13, seeking to have such issue again submitted.

It is insisted that the court erred in refusing to give at the request of defendant a special charge submitting the issue of assumed risk. The defendant had not plead assumed risk on the part of Jack Jones, and for this reason the trial judge refused to give a charge submitting the issue. The burden, as we understand it, is upon defendant to allege and prove that the servant had knowledge of the manner of performing the work in the performance of which he was injured, and of its dangerous character, and assumed the risk thereof. Having failed to plead assumed risk, the court properly refused the special charge. *International & G. N. Ry. Co. v. Harris*, 95 Texas, 346. The charge of the court, taken as a whole, fairly submitted the issues in the case, and there was no error in refusing the several special charges, the refusal of which is complained of in various assignments of error.

It is contended that the court erred in admitting the testimony of the witness Jack Smith as to what was said by him and by hostler Lyle, and the deceased, Jack Jones, upon their discovering that Jack Jones had been injured. While Jack Smith was testifying in behalf of plaintiff he was asked by plaintiff's attorney this question: "Now, Jack, tell all that was said then; all that was said by Jack Jones and the rest of you." Upon objection being made the jury were withdrawn from the court room and witness stated that his answer to the interrogatory would be as follows: "When I came around where Jack Jones was I asked him how he happened to get caught. Jack said 'he went to jump down, and that there was coal under his feet and he slipped and fell, and before he could get up the engine caught him.' I asked Mr. Lyle, the hostler, what he was doing, and he said 'Lord, I would not run over you [meaning Jack Jones] for anything. I did not see you.' Jack Jones said, 'I do not see why you did not see me.' Mr. Lyle said, 'I was monkeying with my ticket.'" The defendant's counsel objected to the answer to said question on the ground that the same was no part of the *res gestae* and was hearsay. The objection was particularly urged to the statement by Jack Jones, "I don't see why you didn't see me," and the reply of Mr. Lyle thereto, that "I was monkeying with my ticket."

The court overruled the objections, and, the jury being recalled, the



witness answered said question as above set forth. The conversation was had and the statements made within five minutes after the accident and while Jack Jones was lying upon the ground on the west side of the track between the trucks at the back end of the tender. At the time he was suffering great pain. It was about 12:30 o'clock in the morning. He died about three hours thereafter, as a result of his injuries. The circumstances under which these statements were made clearly show there was no intention to misrepresent the truth of the occurrence. The statements were *res gestae* and were admissible. *San Antonio & A. P. Ry. Co. v. Gray*, 95 Texas, 424, and authorities there cited.

The court did not err in permitting the witness Joe Postlewait to testify in substance that he could see an object on the track from one to ten feet in front of an engine in operating the engine at the rate of two or three miles per hour. The witness had had fourteen months' experience as an engineer and showed his competency to testify as to the distance an object could be seen on the track by the engineer while operating the engine.

Complaint is made that the verdict and judgment are not supported by the evidence and are against the great weight and preponderance of the evidence; and further that the same are excessive. There was sufficient evidence to justify the jury in finding the verdict they did. The deceased was 32 years old when killed, and was earning \$45 per month. He was an industrious, healthy, able-bodied man, with a life expectancy of 33.93 years. His wife, Sallie Jones, is 28 years old, and his four children are of the respective ages of one, four, seven and ten years. The verdict is large, but we can not say that it is so large as to show that it was the result of passion or prejudice on the part of the jury. *Missouri P. Ry. Co. v. Lehmberg*, 75 Texas, 61; *Galveston H. & W. Ry. Co. v. Lacy*, 86 Texas, 244; *Ft. Worth & D. C. Ry. Co. v. Morrison*, 93 Texas, 527; *San Antonio & A. P. Ry. Co. v. Parr*, 26 S. W. Rep., 861.

Finding no reversible error in the record, the judgment is affirmed.

*Affirmed.*



ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v.  
J. R. MUSICK.

Decided April 25, 1904.

**1.—Shipment of Cattle—Delay—Evidence—Charge—Contract of Sale.**

Although there was no proof of the value of cattle, alleged to have been injured by delay in furnishing cars, on the day they arrived at defendant's pens other than shown by the contract of sale, yet it was proper to refuse a peremptory charge in defendant's favor where plaintiff's proof outside the contract of sale entitled him to at least nominal damages.

**2.—Same—Pleading—Measure of Damages.**

In the absence of notice of the contract of sale of cattle and complaint that special damages were suffered with reference thereto, the contract of sale made before shipment not having been pleaded, the sale price and the contract price could not properly furnish the measure of damages for a failure on the part of the railway to promptly furnish cars for shipment.

**3.—Charge—Failure to Feed and Water Cattle—Error.**

Charge placing liability upon defendant for failure to feed and water cattle during shipment, such liability to attach from the time of delivery and acceptance, held error in view of the undisputed evidence that plaintiff, for a valuable consideration, had assumed that duty.

**4.—Charge—Measure of Damages—Pleading—Error.**

A charge giving the measure of damages as the difference between the market value of the cattle when they should have arrived and when they did arrive at their destination, and also the deterioration in the condition of the cattle due to delay in shipment was erroneous as authorizing a double recovery, the pleading only seeking recovery for deterioration in condition of cattle and not for a fall in the market price.

Appeal from the County Court of Cherokee. Tried below before Hon. James P. Gibson.

*E. B. Perkins and Marsh & McIlwaine*, for appellant.

*Guinn, Norman & Guinn*, for appellee.

GILL, ASSOCIATE JUSTICE.—This suit was brought by the appellee against the appellant railway company for damages alleged to have resulted to certain cattle of appellee on account of the failure of appellant to promptly furnish cars for their transportation.

A trial by jury resulted in a judgment for appellee, and appellant complains of it here for alleged errors committed upon the trial. The cause of action as made by the petition is as follows:

Plaintiff was the owner of 199 head of cattle near Alto, Texas. Intending to ship them from Alto, Texas, a station on defendant's line, to Wortham, on a connecting line, plaintiff notified defendant's agent at Alto that he wished to have the requisite cars on the 17th day of December, 1902. The agent promised to have the cars on the day named, and relying on the promise plaintiff drove his cattle to Alto and by direction of the agent plaintiff placed them in defendant's stock pens on that date, prepaying the freight. In violation of the contract defendant failed to furnish the cars until the 19th of that month, and the cattle remained in the pens until that date without food or water, when they were shipped to Wortham. By reason of the delay and want of food



and water they had so deteriorated in weight and condition that they were worth upon the market at Wortham only \$2200, whereas had they arrived in good condition they would have been worth \$2600. The difference between those two sums is prayed for by plaintiff as damages alleged to have resulted from the failure of defendant to promptly furnish the cars and failure to feed and water the cattle during the delay.

The fact that they were sold in advance at Wortham and were being shipped in pursuance of that sale is not averred. Nor is it averred that by their prompt shipment they would have been sold upon a higher market. The damages claimed are for the deterioration in weight and condition of the cattle.

The defendant answered by general denial and special defenses not necessary to mention.

The evidence adduced by plaintiff tended to establish the allegations of the petition, except that under the contract of shipment plaintiff undertook to feed, water and care for the stock. His failure to do so during the delay at Alto was due to the fact that neither food nor water was procurable at that point, and the agent continued to assure plaintiff that the cars were expected hourly.

There was no proof of the value of the cattle at Wortham on the day they arrived or when they did arrive, unless the contract of sale entered into some time before and the price for which they actually sold be taken as sufficient to present the issue.

Defendant requested a peremptory charge upon this ground and complains because it was not given. The charge was properly refused, as the plaintiff's proof outside the contract of sale entitled him to at least nominal damages.

The special charge mentioned in the second assignment should have been given, as in the absence of notice of the contract of sale and a complaint that special damages were suffered with reference thereto the sale price and contract price could not properly furnish the measure of damages.

The fourth, fifth and sixth assignments are addressed to the same issue as the second and need not be discussed.

The following portion of the court's main charge is assailed: "The law makes it the duty of all common carriers when conveying live stock of any kind to feed and water same during the time of conveyance, and the liability of a common carrier attaches whenever the shipper has done all that is required of him to prepare his property for shipment and has delivered the same to the railway company and it has been accepted."

This was clearly error in view of the undisputed evidence that plaintiff, for a valuable consideration, had assumed that duty. His right to recover notwithstanding this assumption of duty rests upon the facts he pleaded and sought to prove, viz., that his failure to feed and water was due to his reliance on the promise of prompt shipment and the fact that no food and water were to be had.

On the measure of damages the court charged the jury as follows:



**"If you find for plaintiff the measure of damages will be the difference, if any, between the market value of the cattle when they should have arrived at their destination and when they did arrive, and also such damages, if any, as said cattle may have sustained by the unreasonable and negligent delay on the part of defendant in furnishing cars and shipping said cattle after said cattle had been received by defendant for shipment. \* \* \*"**

This section of the charge is complained of as authorizing double damages and misleading the jury.

We think the objections well founded. Had plaintiff sought to recover for deterioration in the weight and condition of the cattle and also for a fall in the market price the charge would have been applicable, but there is neither allegation nor proof of a fall in the market. The only damage shown is the deterioration in the weight and condition of the cattle, and this is included in the latter part of the paragraph concerning the damage sustained by the cattle by reason of the delay. The first part was clearly erroneous in view of the pleading and facts.

For the errors indicated the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## GRANVILLE W. DAVIS v. WALTER McINNIS ET AL.

Decided April 25, 1904. .

**Public Weigher—Statute Construed—Cases Followed.**

The statute, General Laws, 1899, p. 266, prohibiting factors, commission merchants and other persons from weighing certain produce in a precinct where a public weigher has been appointed, applies only to factors, commission merchants and persons engaged in like business. *Whitfield v. Terrell Compress Co.*, 26 Texas Civ. App., 235, and *Galt v. Holder*, 32 Texas Civ. App., 564, 75 W. Rep., 570, followed.

Appeal from the District Court of Anderson. Tried below before Hon. John Young Gooch.

*B. H. Gardner and W. C. Campbell*, for appellant.

*Gregg, Brown & Brooks*, for appellees.

GILL, ASSOCIATE JUSTICE.—Granville W. Davis, as the duly elected and qualified public weigher of precinct No. 1 of Anderson County, brought this suit against the appellees, Walter McInnis and H. A. Woodward, to enjoin them from further prosecuting the business of private weighers in that precinct and to recover damages for what the plaintiff alleges he has lost by their competition.

The trial court sustained a general demurrer to the petition, and plaintiff, refusing to amend, has appealed.

The suit is an attack on the right of appellees to conduct the business of private weighers for such of the public as desire their services, and is based upon the proposition that under the present law governing public weighers no unofficial weigher can engage in the business in precincts where a public weigher has been selected.

Plaintiff concedes that his contention is in conflict with the cases of *Whitfield v. Terrell Compress Co.*, 26 Texas Civ. App., 235, and *Galt v. Holder*, 32 Texas Civ. App., 564, 75 S. W. Rep., 570, but contends that these cases were decided on a wrong conception of the provisions of the statute.

In *Whitfield's* case, *supra*, it is held among other things, that the owners of produce may hire others than the public weigher to weigh it. This includes the right of private parties to equip themselves as private weighers and perform the service. The statute, properly construed, forbids only factors, commission merchants and persons in a like business from weighing the cotton of others consigned to them for sale. This view of the law is followed and emphasized in *Galt's* case, *supra*. We are of opinion those cases are sound, and since the petition in the case at bar contains no allegation which brings defendants in conflict with the law as thus construed, the judgment must be affirmed.

The cases recited review the statutes and authorities and we do not deem it necessary to enlarge upon the point. The amendments of 1903 do not affect the question presented.

*Affirmed.*

Writ of error refused.



## L. M. &amp; E. M. COOK v. BURSON &amp; GAINES.

Decided April 27, 1904.

**1.—Appeal Bond—Affidavit of Inability—Contest.**

Where the record shows that appellant's affidavit of inability to give bond on appeal from justice court was contested, no error is shown in dismissing for his failure to give it where the evidence on contest of his affidavit is not preserved in the record.

**2.—Same—Cost Bond.**

The fact that the rule made on contest of appellant's affidavit was to give a cost bond merely, and his appeal dismissed on failure to comply, does not authorize the conclusion that the evidence passed on by the court referred merely to his ability to give bond for costs and not for the judgment recovered against him below.

Appeal from the County Court of Navarro. Tried below before Hon. A. B. Graham.

*J. T. Williams*, for appellant.

No briefs for appellee.

**KEY, ASSOCIATE JUSTICE.**—This suit originated in the justice of the peace court, where the appellees obtained judgment against L. M. and E. M. Cook. E. M. Cook, one of the defendants, attempted to appeal to the county court, and in lieu of an appeal bond filed a pauper's oath.

At the next term of the court a motion was submitted to dismiss the appeal, for the want of an appeal bond. At the hearing of the motion, the court ruled that the defendant would be required to give a cost bond, and continued the case for that purpose. At the next term of the court, the defendant having failed to comply with the rule referred to, the court sustained the motion to dismiss the appeal.

There is no statement of facts in the record, but it is shown by bill of exception that the court heard testimony as to the ability of E. M. Cook to pay the costs, or give security therefor, which testimony, the bill of exception states, was in effect a contest of Cook's affidavit of his inability to give bond or pay costs. The evidence heard is not set out in the record.

The record discloses no reversible error. It being made to appear that the pauper's oath filed by appellant was contested, and the transcript failing to disclose the testimony submitted in the court below, appellant is not entitled to have the judgment of dismissal reversed. It may have been shown that the affidavit referred to was untrue, and appellant amply able to give the bond required by the statute; and if this was shown, the trial court committed no error in dismissing the appeal.

It may be conceded that the court had no right to make an order requiring the appellant to give a cost bond, or any bond, other than an appeal bond; but it is not shown that the order referred to resulted



in harm to the appellant. If the affidavit in lieu of the appeal bond was contested, and the court heard testimony thereon, as the bill of exception shows, the evidence referred to not being brought before this court, we must presume that it disproved the facts stated in the affidavit and authorized the court to dismiss the appeal. This being the necessary conclusion, the court might properly have dismissed the appeal at the first term; and the appellant has no ground of complaint because, instead of so doing, the court offered to permit him to prosecute his appeal, if he would give a bond for costs by the next term of the court. That action of the court seems to have been a matter of grace offered to the appellant, and if he did not see proper to avail himself of it, the court had the authority at the second as well as the first term to dismiss the appeal.

The judgment is affirmed.

*Affirmed.*



## TEXAS PORTLAND CEMENT COMPANY v. J. B. W. ROSS.

Decided April 27, 1904.

**1.—Evidence—Pleading—Defective Brakes.**

A petition to recover for personal injuries in derailment of tram car having alleged as a cause defect in the brakes in that the brake wheel was too small to furnish sufficient leverage, it was proper to strike out from a deposition of a witness for plaintiff the statement that the brake was "wood-bound," in answer to a question as to the condition of the brake and the efforts made to stop the car with it, but to permit the reading of the rest of the answer, that plaintiff and witness "used every means in our power to get the brake to work, but the brake failed to work," over objection that it was immaterial, irrelevant, the opinion of witness, and not confined to the defects in the track alleged.

**2.—Evidence—Error Cured by Instructions.**

The admission of improper evidence held immaterial where instruction was afterwards given to disregard it.

**3.—Evidence—Pleading—Damages—Expense for Medicine.**

Plaintiff could testify to the amount expended by him for medicines in consequence of injury to his person though to an amount exceeding that alleged in his petition; but an instruction limiting recovery therefor to the amount alleged would have been proper.

**4.—Charge—Specific Facts.**

Charge to find for defendant in absence of proof of the defects in brake of tram car alleged in the petition, should have been given under the state of pleading and evidence in this case.

**5.—Assumed Risk—Contributory Negligence—Charge—Burden of Proof.**

Charge placing the burden of proof of assumed risk and contributory negligence upon defendant held erroneous upon the state of facts disclosed by plaintiff's own testimony.

Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*Etheridge & Baker*, for appellant.

*Simpson & Simpson*, for appellee.

EIDSON, ASSOCIATE JUSTICE.—This is an action brought by the appellee against appellant in the District Court of the Forty-fourth Judicial District of Texas, at Dallas, to recover for personal injuries alleged to have been sustained by him while in the employ of the appellant. The trial resulted in a verdict and judgment in favor of the appellee against the appellant for the sum of \$1000.

Appellee alleged in substance that he was employed and directed by the agents of appellant to operate certain tram cars bringing stone from said company's quarry to the works of said company; that said tramway is elevated about twelve feet above the ground, has on it an iron rail upon which are propelled its cars loaded with stone; that about half way between said quarry and the main works of appellant said tramway divides into two tracks; that said cars run from said quarry to the main works by gravity, and are controlled by brakes only, and that said brakes as used upon said cars are wholly insufficient for the purpose in this, that the wheel at the top of same used for putting the pressure upon said wheel is too small in diameter, and



does not furnish sufficient leverage to control said cars; that said tramway is built of material of insufficient strength for the purpose for which the same is used, and that same was negligently, unscientifically and unskillfully constructed by common labor, and that owing to the lightness of the material with which same is constructed, and the weight of the cars and their loads as used upon same, said tramway was so shaken and torn to pieces that it was dangerous to run cars upon same, but unknown to appellee; that said curve on said track is so constructed that both the inner and outer rails are upon the same level; and at a point where said tracks divide, and where the rails of said tracks are joined end to end, by reason of the lightness of the material with which said track was constructed, and the shortness of the spikes holding said rails in position, and by reason of the heavy loads used by said company, said track and the spikes therein had worked loose at said joints, and caused said rails to become loose and work apart, so that the flange of the wheels of said cars in descending said track would strike said rail squarely in the center of the same, thereby causing said car to leave the track. That on the 24th day of August, 1901, plaintiff was by the direction of said company operating a car heavily loaded with stone from the quarries aforesaid over said elevated track, from the quarry to the main works of said appellant; that on the day so as aforesaid appellee started in charge of said car down said elevated tramway to said works; that about halfway down, by reason of the defective joint aforesaid, and by reason of said car having been overloaded and the worthless brakes of said car, and by reason of the defective manner in which said track was constructed, and the material of which same was constructed, the said car, so as aforesaid, heavily loaded with stone with petitioner upon it, was thrown from said elevated track, a distance of some twelve feet, and said car and its contents overturned upon petitioner, severely and permanently injuring him in his arms, wrists and spine, back and shoulders, and crushing three of petitioner's ribs, thereby maiming petitioner for life. That by reason of the construction and defects and said company's negligence in repairing said track, the work required of this petitioner upon same was dangerous and extra hazardous, and this petitioner being a common laborer, could not and did not discover same. That petitioner is a young man aged 26 years, with a life expectancy of twenty-eight years. That appellee has suffered and is suffering great mental pain and distress from his aforesaid injuries, and was for a long time wholly incapacitated from labor, and by reason of said act of negligence and the injuries caused thereby, appellee will be permanently incapacitated to perform the same labor that he could before said injury, and that he has been at great expense in hiring physicians and securing medical attention, and alleging that he has suffered actual damages as follows: For medicines, the sum of \$15; services of physicians, the sum of \$100; for the loss of wages while permanently incapacitated for four months, the sum of \$50 per month or \$200; and



that by reason of his permanent disability, his loss in wages will amount to the further sum of \$800; for mental and physical suffering occasioned by said injuries, the further sum of \$2500; and further alleging that his aforesaid injuries were caused by the gross, willful and notorious negligence of appellant, and that he has suffered exemplary damages in the sum of \$1500.

Appellant answered by general denial and special answer setting up contributory negligence and assumed risk.

Appellant's first, second and third assignments of error complain of the insufficiency of the testimony to authorize the court to submit the case to the jury, or to support the verdict and judgment rendered and entered.

We overrule these assignments, because it appears from the record that there was sufficient testimony to authorize the court to submit the case to the jury and to support the verdict and judgment.

Appellant's fourth assignment of error complains of the action of the court in admitting in evidence certain testimony of J. W. Ross over its objections, and striking out a part of the answer of said witness to a certain interrogatory propounded to him. It appears from the record that appellee propounded to said witness the following interrogatory: "State the condition of the brake on said car at the time of the accident, and what effort, if any, was made by him to control the car?" The witness answered: "At the time the brake was wood-bound, and would not work. The plaintiff and myself used every means in our power to get the brake to work, but the brake failed to work." The above answer was objected to by appellant as being immaterial, irrelevant, the opinion of the witness, and as not confined to the defects in said track charged in appellee's petition. The court struck out of the answer of said witness the words "was wood-bound," and allowed the remainder of the answer of the witness to be read to the jury. We are of opinion that there was no error in this action of the court, as the remainder of the answer was not subject to the objections interposed, and the court was authorized to strike out that part of said answer which was subject to said objections.

The court below did not err in admitting the testimony of J. W. Ross over the objection of appellant, and complained of in its fifth assignment of error. This testimony was a statement by the witness of a fact, and was not subject to the objection that it was the opinion or conclusion of the witness, and was material and relevant to the issue relating to the sufficiency of the brake.

In its sixth assignment of error the appellant complains of the action of the court in admitting in evidence over its objection certain testimony of the witness Frank Templeton, the ground of objection being that the testimony was the opinion of the witness, and that according to his own testimony it did not appear that he was competent to give an opinion in reference to the matters inquired about. If the testimony was subject to the objections interposed, it appears from



the explanation of the trial judge to the bill of exceptions that the jury were instructed not to regard this testimony, and therefore the appellant could not suffer thereby.

Appellant's seventh assignment of error complains of the action of the court in admitting over the objection of appellant the testimony of plaintiff J. B. W. Ross, as follows: The witness was asked, "Can you estimate how much you have paid for medicine?" and answered, "I expect I have spent something near \$30." Appellant objected to this testimony on the ground that the pleadings of plaintiff did not authorize this testimony, as the amount claimed in the pleadings was less than the amount testified to; and that the answer of said witness was too vague and uncertain to constitute any charge against appellant, and was but an approximation and opinion of the witness.

We do not think the court erred in overruling the objection to this testimony, but it would have been proper for the court in its charge to the jury to have instructed them that appellee would not be entitled to recover a greater amount for this element of damages than he claimed in his pleadings.

The court did not err in excluding the testimony of E. W. McMahan, tendered by appellant, because such testimony clearly would have been but the opinion and conclusion of the witness.

The court below did not err in the paragraph of its general charge complained of in appellant's ninth assignment of error. We think this paragraph is a correct enunciation of the law relating to the facts of the case to which it was intended to apply.

The court below did not err in refusing to give to the jury special instructions numbers 4, 7, 8 and 14, because the general charge of the court instructed the jury correctly and sufficiently upon the matters to which these special instructions refer.

Under its fourteenth assignment of error, appellant complains of the action of the court in refusing to give to the jury its special charge number 13, which is as follows: "If you believe from the evidence that the brake wheel on the car upon which the plaintiff was riding when hurt was sufficiently large to give leverage enough to control said car and to reduce the speed of said car to safe limits, and that in the exercise of ordinary care the plaintiff could and should have controlled said car, then you will find for the defendant."

We think, in view of the pleadings and testimony in this case upon the issue as to whether or not the brake wheel attached to the car upon which the appellee was riding when hurt was sufficiently large to give leverage enough to control said car if operated with ordinary care by appellee, that it was error for the court below not to give this special instruction.

In its twentieth assignment of error the appellant complains of the following paragraph of the court's general charge to the jury: "The burden of proof is upon the plaintiff to make out his case by a preponderance of testimony as to the issues in this case, except the issues



of assumed risk and contributory negligence, and as to these two issues, the burden is on the defendant."

The court nowhere in its charge to the jury defines contributory negligence. In view of this, and also in view of the testimony of the appellee himself tending to show contributory negligence, we believe that it was error upon the part of the court to instruct the jury that as to the issues of assumed risk and contributory negligence the burden of proof was on the defendant. *Gulf C. & S. F. Ry. Co. v. Hill*, 95 Texas, 629; *Texas & P. Ry. Co. v. Reed*, 88 Texas, 439; *Gulf C. & S. F. Ry. Co. v. Allbright*, 7 Texas Civ. App., 21.

We have carefully examined all of the other assignments of error of appellant, and are of the opinion that none of them are well taken, and therefore overrule them.

For the errors above indicated, the judgment of the court below is reversed and the cause remanded.

*Reversed and remanded.*



JOHN HAMILTON & Co. v. WESTERN UNION TELEGRAPH  
COMPANY.

Decided April 27, 1904.

**Lost Papers—Substitution.**

Substitution of a lost petition in a suit should be by a substantial copy of the original, and an amended petition, attempted to be substituted, should be stricken out on motion.

Appeal from the County Court of Dallas. Tried below before Hon. Ed. S. Lauderdale.

*Geo. H. Plowman*, for appellant.

*N. L. Lindsley*, for appellee.

EIDSON, ASSOCIATE JUSTICE.—This is an action brought by appellee against the appellant to recover the sum of \$213.10 for tolls on telegraphic messages between the 1st of December, 1898, and the 1st of April, 1899. On June 12, 1900, appellant filed its amended answer, consisting of exceptions and plea in reconvention for damages growing out of the alleged negligence of appellee in reference to messages to the Caldwell Oil Mill Company, tolls for which messages being included in the amount sued for of \$213.10.

It appears from the record that on account of the illness and subsequent death of the attorney for the appellee, who brought the suit, the case was continued for several terms of court; and that on June 15, 1903, when the case was called for trial, it was discovered that the pleadings were lost and could not be found; and the attorneys for both parties asked permission of the court to substitute the original pleadings, which the court granted; and afterwards, on the same day, appellee filed a petition claimed to be a substantial copy of its original petition. This petition filed by appellees omitted the tolls for the messages sent to the Caldwell Oil Mill Company, upon the alleged negligence in reference to which the appellant based its plea in reconvention.

The appellant, after appellee filed said petition, but on the same day, made a motion to strike out appellee's said petition, because same had been filed without giving to appellant the notice required by law, and because same was not sworn to, and because the same was not a substantial copy of the original.

This motion was overruled by the court, to which appellant excepted. The trial was then proceeded with before a jury, and after the evidence of both parties was introduced, the court peremptorily charged the jury to find in favor of the appellee and against the appellant, which they did.

The record does not show any order of the court affirmatively substituting the petition filed by appellee. Upon the trial the attorneys



for both appellant and appellee testified, and from their testimony it appears that the petition filed by appellee as a substitute for its original petition is not a substantial copy of the original, in that the original included and declared upon the charges for messages sent to the Caldwell Oil Mill Company, which charges are omitted in the petition filed as a substitute. It was upon the alleged negligence of appellee in reference to these messages that appellant based its plea in reconviction.

We think that it appears from the record that appellee attempted to substitute its original petition by an amendment, which under the law can not be permitted. The pleading of the appellee upon which the case was tried was not a substituted pleading, but an amendment, which was not authorized under the law, as the court, after giving permission to substitute the pleadings, should have required the parties to file substantial copies of the pleadings intended to be substituted; and if such copies were not conceded to be substantial copies of the original, then the court should have heard testimony upon the question; and after hearing such testimony, rendered its order or judgment substituting such original pleadings in accordance with the testimony, and the trial should have proceeded upon such substituted pleadings.

We are of opinion that the court erred in overruling appellant's motion to strike out the pleading filed by appellee as a substitute for its original petition, and in proceeding to try the case upon said pleading. Rev. Stats., arts. 1498, 1499; *Newman v. Dodson*, 61 Texas, 91; *Bowles v. Glasgow*, 2 Posey U. C., 714.

For this error the judgment of the court below is reversed and the cause remanded.

*Reversed and remanded.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS v.  
S. L. MATHERLY.

Decided April 27, 1904.

**1.—Railway Crossing—Contributory Negligence.**

The question of contributory negligence of a plaintiff injured by collision with an engine at a crossing held to be one for the jury.

**2.—Negligence in Law—Violating City Ordinance.**

The violation of a city ordinance regulating the running of engines and trains within the city constitutes negligence and the court may so charge.

**3.—Ordinance—Reasonableness—Pleading.**

The question whether a city ordinance on the subject is an unreasonable restriction on the right of a railway to operate its trains must be raised by proper pleadings and proof.

**4.—Lighting Crossing—Ordinance—Harmless Error.**

The admission in evidence of a city ordinance requiring a railway to keep an arc light at a certain crossing and refusal of defendant's requested instructions thereon can not be ground for reversal where the court refused to submit the issue of negligence in failing to keep such light as required.

**5.—Evidence—Relevancy—Harmless Error.**

On proof of failure to maintain a light at a street crossing as required by a city ordinance, evidence as to how lights were kept at other crossings was immaterial; or, if material, its exclusion became harmless error when the court declined to submit the absence of light as a ground for recovery.

**6.—Injury at Crossing—Lookout.**

Failure to use ordinary care to discover and avoid injury to one rightfully using a public street crossing by railway employees operating its trains is negligence.

**7.—Charge—Request—Refusal.**

Failure to give requested charges is not error when the ground is covered by the court's general charge.

Appeal from the District Court of Grayson. Tried below before Hon. J. M. Pearson.

*T. S. Miller and Smith & Beaty, for appellant.*

*Randell & Wood, for appellee.*

EIDSON, ASSOCIATE JUSTICE.—This suit was brought by appellee, a young man about 24 years old, against the appellant for the sum of \$40,000 actual damages, on account of personal injuries received by him through the alleged negligence of the appellant. The allegations of negligence embraced in plaintiff's petition are substantially as follows:

(1) By running its train at a high and dangerous rate of speed over the public street, to wit, thirty miles an hour. (2) In permitting cars, buildings and other obstructions which would obstruct the view of its track, to be on and near its right of way. (3) In running its engine across a public street while it was dark without a headlight. (4) In running its engine at a greater rate of speed than six miles an hour, in violation of an ordinance of the city of Denison. (5) In running its engine over a public crossing without blowing the whistle



on engine, as required by the general statute. (6) In running its engine in the city of Denison without ringing the bell, as required by the ordinances of the city. (7) In failing to keep a watchman at the public crossing where appellee was injured. (8) In failing to keep an arc light at the intersection of the railroad and public street, as required by the ordinances of the city of Denison. (9) In failing to keep a proper lookout for persons on its tracks. (10) In discovering appellee's peril and failing to stop engine and prevent his injuries. (11) In operating one train east and another west over its two tracks over the public street at which appellee was injured at the time he was injured.

Appellant answered by general denial and pleaded contributory negligence and assumed risk.

The trial had before a jury resulted in a verdict and judgment in favor of the appellee for \$12,000.

The appellant's first and second assignments of error set up that the evidence upon the question of contributory negligence upon the part of appellee was sufficiently clear and undisputed to require the court to instruct the jury to find a verdict for the defendant. We have carefully considered and examined the testimony contained in the record, and find that there was sufficient evidence to authorize the court to submit the case to the jury, and that it would have been error for the court to have withdrawn the case from them by a peremptory instruction to find a verdict in favor of the defendant.

The third assignment of error of appellant complains of the charge of the court in the fourth and fifth paragraphs thereof, in instructing them that the violation of the city ordinance referred to constitutes negligence per se. It has been repeatedly held that charges to this effect are not erroneous. *Texas & P. Ry. Co. v. Brown*, 11 Texas Civ. App., 503; *Gulf C. & S. F. Ry. Co. v. Calvert*, 11 Texas Civ. App., 297; *Gulf C. & S. F. Ry. Co. v. Pendery*, 14 Texas Civ. App., 60.

The ordinances referred to do not change or affect the civil rights of the parties to this suit, as they exist under the common and statute law of this State. Ordinances of this character have repeatedly been held to be reasonable restrictions on railways; but in order to properly raise the question as to whether the ordinance constitutes an unreasonable restriction on railways, the issue should be raised by proper pleadings and proof.

The fourth, sixth, seventh and eighth assignments of error relate to the admission in evidence of the ordinance of the city of Denison which provides that railway companies shall provide lights where streets cross such railways, and the question as to whether appellant was guilty of negligence in failing to provide such lights, and the refusal of the court to give certain special instructions asked by appellant in reference to the maintenance of said lights, the court having refused to submit to the jury as an issue of negligence on the part of appellant its failure to maintain a light at Armstrong Avenue



crossing, the admission of the said ordinance, and the refusal of the court to give the special instructions asked by appellant upon said issue, did not constitute error.

There was no error in the action of the court in excluding the evidence of the witness Yoakum, as complained of in the fifth assignment of error. It was irrelevant and immaterial as to how the lights at other street crossings were maintained. It was only material for appellant to show that the light at Armstrong Avenue crossing, where the injuries were received by appellee, was maintained by the city, and this witness was permitted to testify to that effect. But, as above stated, the court having withdrawn this issue from the jury by a failure to charge upon same, the exclusion of this testimony was harmless to appellant.

We do not think there was any error in the fourth paragraph of the general charge to the jury, complained of in appellant's ninth assignment of error, when construed in connection with the remainder of said charge.

The seventh paragraph of the charge to the jury is not subject to the criticisms of appellant contained in its tenth assignment of error. The place where appellee received his injuries, being a public crossing, and a place where he had a right to be, it was the duty of appellant's employes in charge of the train or engine to use ordinary care in keeping a proper lookout to prevent injury to parties on or at such public crossing; and if by the use of ordinary care such employes could have discovered the peril of appellee, and they failed to use such ordinary care, such failure would constitute negligence. The authorities cited by appellant have reference either to cases where the party injured was a trespasser, or in which the question as to whether the place where the injury occurred was a place where such party had a right to be was not raised. *Texas & P. Ry. Co. v. Roberts*, 14 Texas Civ. App., 533.

There is no reversible error in the eighth paragraph of the charge of the court, complained of in appellant's eleventh assignment of error, when construed in connection with that part of the general charge which defines contributory negligence.

There was no error in the refusal of the court to give to the jury appellant's special instruction number 6, because the matter to which said special instruction relates was properly and fully covered in the court's general charge.

Finding no reversible error in the record, the judgment of the court below is affirmed.

*Affirmed.*

Writ of error refused October 13, 1904.



MOORE-MAYFIELD COMPANY v. MISSOURI, KANSAS & TEXAS  
RAILWAY COMPANY ET AL.

Decided April 27, 1904.

**Dismissal—Final Judgment—Appeal.**

A judgment in justice court that the case of plaintiff, who appeared and announced ready, but refused to plead or introduce evidence, be dismissed for want of prosecution and defendant go hence without day, was a final judgment from which plaintiff might prosecute appeal.

Appeal from the County Court of Wood. Tried below before Hon. A. A. Snow.

*Hart & Hart*, for appellant.

*Geddie & Snow*, for appellees.

EIDSON, ASSOCIATE JUSTICE.—This suit was brought by the appellant against the appellees in the Justice Court of Precinct No. 2 of Wood County, to recover the sum of \$126.02, alleged damages to Irish potatoes. The suit was filed on the 7th day of January, 1903, and on the 21st day of May thereafter the case was called for trial in the justice court, and appellant and appellees both announced ready for trial; and appellant failed to plead, and failed to offer any testimony to support its cause, and the cause was dismissed by the justice court for want of prosecution, and judgment rendered against the appellant for all costs of suit.

The appellant appealed the cause to the County Court of Wood County, and on the 14th of July, 1903, the cause was called for trial in said county court, and both parties appearing in person and by attorneys, motion was made by the appellees to dismiss the cause for want of jurisdiction, because the same was dismissed in the justice court for want of prosecution; and the county court sustained the motion of the appellees, and dismissed the case and entered judgment against the appellant for costs of suit.

It appears from the record that the county court dismissed the appeal on the ground that there was no final judgment entered in the justice court. The judgment entered in the justice court appears from the record to be as follows: "Now on this day came on to be heard the above styled cause, and the parties, both plaintiffs and defendant, being by attorneys before the court, announce ready for trial, and the plaintiff failed and refused to plead his cause or to offer any testimony to support same, the defendant moved the court to dismiss said cause for want of prosecution, because the plaintiff refusing to plead or to resist said motion to dismiss said cause, and the court having considered said motion is of opinion same is well taken, and said cause is by the court dismissed, and it is ordered that defendant go hence



without day, and that plaintiff pay all costs in this behalf expended, for all of which let execution issue."

We are of opinion that the above judgment is a final judgment, and one from which the appellant was authorized to appeal to the county court, and that the county court erred in dismissing the cause. *Winston v. Masterson*, 87 Texas, 200; *Parker v. Spencer*, 61 Texas, 155; *Hagood v. Grimes*, 24 Texas, 16; *West v. Bagby*, 12 Texas, 34; *Hanks v. Thompson*, 5 Texas, 6; *Horton v. McKeehan*, 1 White & W. Civ. Cas., sec. 467; *Howeth v. Clarke*, 4 Willson Civ. Cas., sec. 72.

The judgment will therefore be reversed and the cause remanded.

*Reversed and remanded.*



MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS  
v. L. E. CRUM.

Decided April 27, 1904.

**1.—Master and Servant—Knowledge of Defects—Risk Not Assumed.**

The servant though knowing that machinery was defective, as that the washout plug of a locomotive engine was leaky, did not assume the risk of danger not implied by such condition, such as injury from such plug blowing out.

**2.—Injury—Pleading—Evidence.**

Where plaintiff's pleading stated the nature of the injuries to his person, it was not necessary to allege increased susceptibility to colds as resulting therefrom in order to admit evidence of a physician that such result was probable.

**3.—Evidence—Engineer's Report of Defects.**

A locomotive engineer could testify that he had entered a certain defect in a locomotive in a book kept by the railway for such reports, without notice given to the defendant company to produce such writing.

**4.—Pleading—Evidence.**

Evidence that plaintiff jumped or fell from his engine in escaping from steam from a blown out plug was admissible though the pleading alleged that he was blown from it by the escape of steam, such being proof of the substance of the issue.

Appeal from the District Court of Grayson. Tried below before Hon. J. M. Pearson.

*T. S. Miller, Head & Dillard, and A. L. Beaty, for appellant.*

*Wolfe, Hare & Maxey, for appellee.*

FISHER, CHIEF JUSTICE.—This is an action for damages on account of personal injuries sustained by the plaintiff, resulting from the blowing out of the plug in the boiler on one of the appellant's locomotives, while he was in the performance of his duties as a fireman. Verdict and judgment was rendered in his favor for \$5000.

The appellee's petition contains the following averments: That heretofore, to wit, on or about the 22d day of August, 1902, plaintiff was in the employ of said defendant as a fireman on one of its locomotives being operated in the yard in the city of Denison; that on said occasion, plaintiff received serious and permanent injuries on account of the negligence of the defendant; that said injuries were occasioned by reason of the fact that the locomotive steam pipes, plugs and cab of the same on which plaintiff was put to work were old, worn, out of repair and unfit for use in the following particulars: That a certain plug on the fireman's side of said engine, known as the washout plug, and located at a point somewhat beneath the deck or cab of said engine, was so out of repair, so defective and loose, old, worn and unfit for use, that the same, by reason of the pressure of the steam, blew or came out of its fastenings, and permitted the steam and hot water to escape from said locomotive and boiler in great quantities; and the same, by reason of the hole in the deck of said cab,



was thrown into said cab, onto, over and against plaintiff, to that he was blown from the cab of said engine to the ground, striking on the rails, iron or other substance, causing him serious and permanent injuries in his back, and scalding him from his wrists down to his feet; that plaintiff also at the time and in the same manner received serious injuries to his chest, abdomen and all internal organs thereof, as well as to his testicles, sight, hearing and nervous system, from which he has been caused to suffer mental anguish and physical pain, and on account of which he will suffer as long as may live; that his time has been wholly lost from the time of the accident to the present time, and his ability to labor and earn money in the future has been greatly lessened; that the defective condition of said engine, cab, steam pipes and washout plug heretofore enumerated was unknown to the plaintiff; that they were well known to the defendant, or by the exercise of ordinary care could have been known.

The defendant filed a general denial and general demurrer, and pleaded that plaintiff was guilty of contributory negligence, and that the injuries received resulted from the risks assumed by the plaintiff, and that the plaintiff had notice of the defect pleaded, which caused his injuries, or by the exercise of ordinary care could have known the same.

We find that the plaintiff at the time he was injured was in the employ of appellant as fireman, and was in the performance of his duties when injured. That the plug described and mentioned in his petition was defective and blew out, causing steam to escape and enter the cab, from which, in order to escape the same, the plaintiff jumped or fell to the ground and sustained some of the injuries alleged in his petition. That in permitting the plug to get in the condition alleged, the railway company was guilty of negligence. The plaintiff knew that the plug was leaking, and had some knowledge of its defective condition; but we find that there is evidence in the record which authorizes the conclusion that its defective condition was not of such a character that would necessarily imply danger, and that the plaintiff did not know that from the defect the plug would likely blow out, or that its condition at that time was dangerous. The facts as found in the record also authorize the conclusion that while the defect existed the danger that might result from the same was not apparent and obvious, or that it was of such a nature and character that a man so situated as was the plaintiff, with his knowledge, would be charged with notice of the danger. The evidence warrants the verdict as to the amount of damages sustained, and that the issues of assumed risk and contributory negligence were not established by the evidence.

There are assignments of errors complaining of the verdict and the charge of the court and the refusal to give requested instructions to the effect that the plaintiff was not entitled to recover, because by reason of his knowledge of the defect in the plug that blew out, he assumed



the risk of any danger that thereafter arose by reason of continuing in the performance of his duty as fireman.

As stated in our findings of fact, there is evidence to the effect that the defective condition of the plug was discovered before it blew out; but the evidence bearing upon this subject indicates that the defect was not of such a nature or character that implied that danger might result from its condition; and there is testimony to the effect that the plaintiff did not know of the danger that might arise from such defective condition. The engine at the time the plug blew out was in use by the railway company under the control of an engineer, who had reported and made an entry upon a book used in such cases the fact that the plug was leaking and defective.

A servant is not required, in all instances, to quit his master's service and refrain from the performance of duties for which he was employed merely upon discovering the existence of a defect, however slight, in the machinery or the appliances with which he is working; and we are of the opinion that this case comes within this rule. Defects might arise, and such is frequently the case, that merely indicate the existence of the defect, without its being of such a nature as would impart notice or knowledge to a man of ordinary prudence that danger might or would arise from its defective condition. If we assume that the plaintiff was not skilled in the use of the machinery and the appliances of the engine in question, or that from his experience as a fireman and the knowledge that he possessed of the engine and all of its parts, we can not in either instance, from the evidence in the record, reach the conclusion that the verdict of the jury did not correctly determine in his favor the fact that he did not know of the danger that might arise from the condition of the plug, or that the defect was of such a character as would impress him, with his knowledge and in his situation, that danger existed. *Galveston H. & S. A. Ry. Co. v. Smith*, 24 Texas Civ. App., 131, and cases there cited.

The charge complained of in appellant's fourth assignment of error was correct. It stated what we understand to be the law on the subject of assumed risk.

We are of the opinion that the charge of the court is not subject to the criticism directed against it by the seventh assignment of error. The court submitted the question of assumed risk, and also contributory negligence.

The evidence complained of in the eighth assignment of error was admissible. It was not necessary that the plaintiff should allege, as one of the conditions likely to result from his injuries, that his susceptibility to colds was increased. He pleaded the nature and character of his injuries, and it was proper for the physician to testify that as a result of such injuries he was subject and liable to colds.

The testimony complained in the ninth assignment of error was admissible. It was proper for the engineer Wren to state that he had made and entered in a book kept for that purpose an entry of the



defects in the engine. It was not necessary to introduce the book to establish this fact. The book was in the possession of the railway company, and it was the duty of the engineer to make such entries. The fact that he did make them could be testified to by him.

The tenth and eleventh assignments of error complain of the action of the court in refusing to exclude the evidence tending to show that the plaintiff jumped or fell from the engine to the ground. The objection to the evidence is predicated upon the proposition that the petition alleged that the plaintiff was blown from the cab. The substantial ground of negligence alleged is the defective condition of the plug. As one of the results, plaintiff in his petition stated that he was blown from the cab by the escape of steam. As an incident or result of the negligence plaintiff unnecessarily undertook to state his method of leaving the cab. The fact that he was blown from the cab as a result of the negligence, or that he fell from it or voluntarily left it by jumping, was attributable to the negligence complained of, which produced a result by the escape of steam that made it dangerous for him to remain in the cab. In *Gulf C & S. F. Ry. Co. v. Johnson*, 83 Texas, 631, the plaintiff alleged that he was thrown from the hand car by the derailment of it. The proof showed that as he was falling he jumped from the car in order to save himself. This was held to be a sufficient correspondence between the allegation and the proof. The injuries in the case cited sustained by the plaintiff were, in the main, the result of leaving or jumping from the car. Other cases upon this subject are cited in the opinion of the Supreme Court in the recent case of *Hicks v. Railway Co.*, 96 Texas, 355, where a question analogous to that under consideration was discussed, and it was held that it was only necessary to establish the substance of the issue, and that averments of the character as stated by the plaintiff in this instance were not required to be strictly proven as alleged.

We find no error in the record and the judgment is affirmed.

*Affirmed.*

Writ of error refused October 13, 1904.



## A. W. BLACK ET AL. V. MINNIE MOORE ET AL.

Decided April 27, 1904.

**1.—Official Bond—Liability of Sureties—Injury Resulting in Death.**

The ruling on former appeal herein (*Moore v. Lindsay*, 31 Texas Civ. App., 13) holding the sureties of a constable liable in damages for his wrongful act in killing one whom he was attempting to arrest upon a lawful warrant approved and followed.

**2.—Principal and Surety—Damages—Verdict—Judgment.**

Where, in an action against a constable and his sureties for injuries resulting in death caused by the officer's wrongful act in making a lawful arrest verdict was rendered against the constable for \$500 and against the sureties for \$250, it was error for the trial court to render judgment thereon against both principal and sureties for \$500; nor was it proper for the appellate court, on reversal therefor to render the same judgment or any judgment on such verdict.

Appeal from the County Court of Lamar. Tried below before Hon. John W. Love.

*Hodges & Moore*, for appellants.

*Hale, Allen & Dohoney*, for appellees.

**KEY, ASSOCIATE JUSTICE.**—This is a suit brought by a surviving wife and minor children to recover damages for the death of the husband and father. The suit is against a constable and the sureties on his official bond, and from a judgment in favor of the plaintiffs the defendants, who were sureties, have appealed.

The case comes to this court by transfer from the Fifth District, and we find that it has been on appeal once before, where the main defense relied on by the sureties was decided against them by the Court of Civil Appeals for the Fifth District. *Moore v. Lindsay*, 31 Texas Civ. App., 13. It was there contended that under the doctrine announced in *Hendrick v. Walton*, 69 Texas, 192, the sureties on the constable's bond were not liable to the plaintiffs, conceding that the constable, while attempting to execute a lawful writ, had wrongfully killed I. L. Moore, who was the husband of one and father of the other plaintiffs. On this appeal, appellants ask to have the question reconsidered, and the former decision overruled. This court has given the question consideration and reached the conclusion that the decision on the former appeal was correct.

At the last trial the jury returned a verdict for the plaintiffs for \$500 against Lindsay, the constable, and for \$250 against the sureties. The judgment was first rendered in accordance with the verdict, but upon motion of the plaintiffs the court changed it, so as to make the sureties liable for \$500, and this action by the court is assigned as error. The assignment must be sustained.

It is now well settled that in jury trials the court has no power to disregard a verdict and enter judgment, however clear and convincing



the facts may be in support of the judgment. *Ablowich v. Bank*, 95 Texas, 429, and cases there cited. However, it is suggested on behalf of appellees that this court has the power, after setting aside the judgment of the court below, to render a similar judgment here; and it is contended, upon the undisputed testimony and the finding of the jury, that as the constable was liable for \$500, this court should render judgment against the sureties for the same amount. Conceding that this court has the power referred to, we are of opinion that it should not be exercised in this case. The action is one sounding in damages, and we do not think the verdict of the jury clearly fixes the amount of damages. It is true that it finds for the plaintiffs in the sum of \$500 against one defendant; but it also finds for only \$250 against the other defendants; and we see no reason why the latter amount, as well as the former, should not be looked to in determining the amount of damages assessed by the jury; and so regarding the verdict, we are unable to say that it fixes with certainty the damages at any sum in excess of \$250. Hence we decline to adopt the suggestion that this court reverse and render.

For the error pointed out, the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## MIRANDA SHANNON V. MARY M. MARCHBANKS ET AL.

Decided April 27, 1904.

**1.—Grantor—Intention—Title—Charge.**

It was not error to refuse a requested charge instructing that testimony of statements made by defendant two years before she put plaintiffs in possession of the land in controversy should not be considered for the purpose of proving that she gave the land to plaintiffs but only as showing her intention, since the only issue was whether it was her intention to convey the absolute title or only a life estate when she put them in possession.

**2.—Continuance—Evidence—Affidavit of Physician.**

The trial court properly refused a continuance for the testimony of a party to the suit whose deposition had been taken *ex parte* by her adversaries, but not in her own behalf, where it appeared, upon the affidavit of her family physician, that she was at the time of trial too feeble in health and mind to attend court and would likely continue in that condition.

**3.—Evidence—Deposition—Interrogatories.**

Testimony of a witness who took the deposition of one of the parties to a suit that she asked him how she should answer the interrogatories, which would probably have been excluded if objected to, is not ground, when admitted without objection, for an application for continuance to meet and explain it.

Appeal from the District Court of Johnson. Tried below before Hon. Wm. Poindexter.

*O. T. Plummer*, for appellant.

*S. C. Padelford*, for appellees.

**JAMES, CHIEF JUSTICE.**—Mary M. Marchbanks and her husband brought this suit against Miranda Shannon for specific performance to secure title to twenty-five acres of land which they claim the latter gave her daughter, Mrs. Marchbanks, by parol in 1897, averring that defendant placed plaintiffs in possession of the land and that they made valuable and permanent improvements on the land, on the faith of said gift. The trial resulted in a verdict for plaintiffs.

Defendant answered by general denial and also that she gave said land to her said daughter for her daughter's life or as long as she remained on the land.

The fifth assignment complains of the refusal of the following charge: "You are instructed that you will not consider the evidence of Fred Vickers, G. D. Green and — Driscoll for the purpose of establishing or proving that Mrs. Shannon gave the land mentioned in the pleadings to Mrs. Marchbanks, but you can consider it as showing, if it shows, what the intention of Mrs. Shannon was, if you should find from a preponderance of the evidence she placed Mrs. Marchbanks in possession of the land."

The proposition made to this assignment is: "The evidence was not admissible to prove a gift of the land to Mary Marchbanks, who was not present; if appellant made the statement as sworn to by the witnesses the statement did not amount to a gift, as the same was not



in writing, but only declared a purpose which appellant voluntarily made to perform sometime in the future to strangers to the contract claimed to have been made with Mary Marchbanks."

The witness Vickers testified in effect that in 1896, at the request of appellant, he and J. F. Kirtley surveyed and set apart the twenty-five acres in question for Mary Marchbanks, and that appellant stated to him that Mary Marchbanks should have an equal share of the land with appellant's other children. Driscoll testified in effect the same.

Green testified that appellant stated to him on the occasion that Vickers and Driscoll were at her house that she wanted Mrs. Marchbanks to have out of her part of the land an equal share with the other children and wanted him (the said Green her attorney) to have it put into the judgment of partition (rendered in 1896), but witness told her that it could not be done, as Mrs. Marchbanks was not a party to the suit.

J. B. Marchbanks testified that it was the latter part of the year 1898 that they moved on this land and put improvements upon it.

The above is the testimony cited by appellant in support of the proposition.

Appellant argues then that the only issue in the case was, did appellant intend to give Mrs. Marchbanks the land, or did she merely intend that the latter should have possession of it during her life or so long as she occupied it? That this being so the jury should have been told that they could only consider the testimony of Vickers, Green and Driscoll as to what appellant's intention was at the time she put appellees in possession of the land, which was about two years after her said statements were made.

It was undisputed that appellant put Mrs. Marchbanks and husband in possession of the land. Although she may have done this two years after making said statements, they were evidence bearing on what her intention was at the time they were put in possession, and this appellant does not seem to question. From the above argument, it being the only issue, it is impossible to conceive in what other issue it could have been considered by the jury.

A gift of land need not be in writing, but may be evidenced entirely by parol, and will become an equitable title if possession be taken and improvements made on the land on the faith of the parol gift. *Cable v. Worsham*, 96 Texas, 92.

Besides, the requested instruction would have submitted to the jury as an issue of fact from a preponderance of the evidence whether or not appellant placed Mrs. Marchbanks in possession, when there was no question as to that fact.

All the other assignments relate to the refusal of the trial judge to grant appellant a continuance, and to the refusal of a new trial because a continuance was not allowed.

It appears that this cause was filed on August 9, 1902, and the trial had on May 12, 1903. It appears also that plaintiffs had caused the



deposition of appellant to be taken in October, 1902. The ground of the application was that appellant was sick near Cleburne, where she resided, that her mind was in no condition for her to testify in her then feeble condition, and that she had some hope that her mind would improve in case her personal health should improve. It appears that she gave her deposition taken *ex parte* in October, but the deposition is not in the record, except a portion which was used in her behalf on the trial, which portion was a denial that she ever put plaintiffs in possession of the land as their land, but that she just let them live on it, and that she never heard of their claiming the land as their property. This was practically a denial of any gift, or any intention to give them the land, and covered the matter in issue. The court in overruling the continuance acted upon the fact that said deposition had been taken, and also upon the fact that no proper diligence was used to procure her evidence. This had reference to the contest filed to which the court refers in the bill of exception, from which it appeared that appellant was very old and feeble, not in good health, and had been in this condition before and since the previous term; that at the previous term the case was postponed to another day because of her feeble condition, and that she was now in such a feeble condition that she would not be able to attend the trial at this term or the next term; that she is as well now as she ever would be, on account of her age and feebleness, that instead of getting stronger she will get weaker. An affidavit of appellant's physician was a part of the application and reads as follows: "This is to certify that Miranda Shannon is now and has been for past two months or more, and she is too feeble in health and mind to even come to town or attend court, or even her household duties. I also certify that I think it extremely doubtful that she will ever be able, at least for a long time, to attend court. I am her family physician and have been for many years. She is now under my treatment."

From what was before the trial judge in this matter we can not well hold that he erred in considering that the circumstances had been such since the commencement of this suit, as necessitated, in the exercise of proper diligence, the taking of her deposition. Nor can we, without having before us the deposition itself in its entirety, say that she did not testify fully concerning what was in issue. We think this latter reason not only necessitates our sustaining the order overruling the continuance, but also requires us to overrule the seventh assignment of error, which is that appellant's motion for new trial should have been granted, wherein it was undertaken in her behalf to be shown that she had been restored sufficiently to enable her to attend court or to give her deposition.

From the fourth assignment it appears that on the trial a witness (G. D. Green) for plaintiff, while testifying, stated among other things that he was the officer who had taken appellant's *ex parte* deposition, and that when he read over to her the interrogatories she asked him



how she should answer them; that he told her it was not his business to tell her how to answer them; that she must answer them for herself. It appears that at the trial, after witness had made this statement, appellant's counsel asked the court to set aside its order refusing the continuance, upon the ground that it would be necessary for appellant to be present and to testify and explain to the court and jury why she asked Green said question, and that if no explanation is given, or if the statement were not denied, said testimony would prejudice the minds of the jury against her in reference to said deposition, and that justice requires that the case be continued to give her an opportunity to be present so she can testify.

The bills shows that this statement of the witness was not objected to. It is to be presumed, in the absence of any explanation in the record, that it was made in answer to a question, and that defendant's counsel had ample opportunity to object. An objection would probably have been sustained. The question which appellant is said to have asked Green was how she should answer the interrogatories. Without some further testimony the question could and should be taken as having reference to the manner of answering the interrogatories, instead of what her answers should be. In this condition of the testimony it should have been excluded, and no doubt would have been if counsel had taken the trouble to interpose an objection to it. Having made no effort to exclude it, it furnished appellant no ground for complaint.

*Affirmed.*

Writ of error refused.



## W. A. METCALFE V. ROSA LOWENSTEIN ET AL.

Decided April 27, 1904.

**1.—Deed—Description of Property—Correction of Mistake—Evidence.**

The only issue being a question of reforming a deed from defendant to plaintiff for mutual mistake in describing the property conveyed, the fact that a mistake occurred and had been corrected in reference to some other deed to the same property could not influence the jury in their decision of the issue before them. Further, testimony of such mistake and correction having been admitted without objection, it was not error to admit in evidence the deed of correction itself.

**2.—Same—Mistake in Description of Property.**

Plaintiff conveyed the lot in controversy to defendant without consideration upon the agreement that he should soon reconvey, and in the deed of reconveyance the lot was described as lot 4 instead of lot 3 in a certain block. Evidence held to show that such misdescription was a mistake and a peremptory instruction to find for defendant on the ground that he knew the description contained in the deed was properly refused.

**3.—Requested Charge—Assuming Fact.**

A requested charge assuming as a fact a certain issue in dispute was properly refused.

**4.—Same—Issue Suggested.**

A complaint that the court should have submitted an issue suggested in a requested charge, although the charge itself was erroneous, should be made by a separate assignment of error in order to be considered on appeal.

**5.—Mutual Mistake—Intention—Refusal of Requested Charges.**

Whether or not it was the intention of the parties to convey the lot in controversy governs the question of mutual mistake in description, and not whether either party knew that the lot was described as No. 4, it being in fact No. 3 in a certain block. Requested charges on this point held properly refused.

## ON MOTION FOR REHEARING.

**6.—Charge Ignoring Issue Raised—Assignment of Error.**

A charge to find for plaintiff if the jury believed that defendant was under the impression that he was reconveying the property which plaintiff had conveyed to him a short time before, was erroneous in that it ignored the issue raised as to whether defendant was under obligation to reconvey; and defendant can complain of such error under a general assignment alleging error in the charge.

Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*Rhodes Baker and Thomas & Rhea*, for appellant.

*Finley, Knight & Harris*, for appellees.

JAMES, CHIEF JUSTICE.—Rosa Lowenstein, joined by her husband, brought this suit against W. A. Metcalfe for the reformation of a deed from said Metcalfe to said Rosa Lowenstein, dated May 18, 1898, upon the ground of inadvertence and mistake. The substantial averments of the petition are that on January 15, 1898, she and her husband made a deed to Metcalfe for lot No. 3 in block No. 3 in a certain subdivision in Dallas, at Metcalfe's instance, without any consideration, with the agreement that Metcalfe would in a short time thereafter reconvey the



property to plaintiff Rosa Lowenstein, it being her separate property; that on May 18, 1898, in pursuance of said undertaking and with the intention of all the parties of reconveying the same lot to said Rosa Lowenstein, Metcalfe made the said deed of date May 18, 1898, which deed, however, by inadvertence and mistake as aforesaid, described the lot as No. 4 in block 3 in said subdivision, and further described it as "being the same property conveyed to me by A. Lowenstein October 18, 1897," when in fact the deed of date October 18, 1897, was a deed from A. Lowenstein to Mrs. Lowenstein conveying the lot No. 3, but erroneously describing it lot 4, block 3, in said subdivision, the petition alleging that this was also a misdescription of the lot intended to be conveyed, which was afterwards on October 21, 1892, corrected by another deed from Lowenstein to his wife. The petition also alleged that Metcalfe never owned lot No. 4, block 3, of said subdivision, and that the only lot he ever held title to was lot No. 3, which was conveyed by the deed of January 15, 1898, and that he has refused to correct the mistaken description contained in his deed of May 18, 1898.

The defenses need not be stated, except in the discussion of the several assignments of error. The verdict was for plaintiffs.

We consider there is nothing in the first assignment which questions the sufficiency of the petition, as not averring that the mistake was mutual. The pleading is to that effect.

In regard to the second assignment, it appears that the court admitted in evidence the deed from A. Lowenstein to his wife of October 21, 1902, correcting his former deed to her, so as to describe the lot as No. 3, instead of No. 4. The objection as embodied in appellant's proposition was that evidence of transactions between plaintiffs since the beginning of this controversy was self-serving and inadmissible.

The issue was the question of reforming a deed from Metcalfe to Mrs. Lowenstein, for mistake appertaining to that particular deed, and the charge submitted this and no other matter. How, under such circumstances, in deciding that issue the jury could be affected by the fact that a mistake occurred and had been corrected in reference to some other deed, is hardly conceivable. But there is another and a clearer ground for overruling this assignment. Mrs. Lowenstein testified in reference to the deed of October 18, 1897, from her husband to herself, and also in reference to the deed of 1902 correcting it. She testified, "This instrument is the deed executed by A. Lowenstein October, 1902, in correction of the deed of October 18, 1897. The correction deed was executed by A. Lowenstein to me. \* \* \* The first time I knew of an error in the description of the lot was after I contracted to sell the lot and a deposit had been put up. Mr. Anderson, my agent, came to me and said, 'There is a mistake in this and we can not close it until you have it corrected.' Also, 'The first deed from A. Lowenstein to me describes this property as lot No. 4 in block 3.' There was enough in her testimony to show that the original deed to her from her husband was in 1897 corrected by another deed from him, in the matter of de-



scription of this lot. This testimony was admitted without objection. We think the jury had before them practically the same testimony without the deed as with it, hence the admission of the deed was harmless.

It is insisted by the third assignment that as Metcalfe, when he executed the deed in question, understood its contents and knew the description it contained, a peremptory charge in favor of defendant, which was asked, ought to have been given. The testimony was not conclusive that Metcalfe was conscious at the time that the deed described lot No. 4, and if he did the evidence admits of the conclusion from all the circumstances attending the transaction that it was his belief, as well as his intention, that he was carrying out his agreement as testified to by Mr. and Mrs. Lowenstein to reconvey the property which they had shortly before conveyed to him. The evidence tends to impress one that he as well as Mrs. Lowenstein was acting upon the idea that such lot was being reconveyed. The jury were warranted in finding against defendants' testimony to the contrary.

The fourth assignment of error involves the following refused charge: "If you believe Metcalfe accepted the conveyance of lot No. 3 as a credit on his debt, and without any agreement, at or prior to said conveyance, to reconvey same to Rosa Lowenstein, the full title to said lot became vested in him, and if you so find, and if you further find that there was no consideration running to him to execute said deed of May 18, 1898, then you are told that even if he thereby intended to reconvey said lot No. 3 to said Rosa Lowenstein, said attempted reconveyance was without consideration, and you will find for defendant." The charge assumed that defendant had a debt, which was a matter of conflict in the evidence. At least it would naturally convey that impression from its wording. For this reason it was right to refuse it. In a supplemental brief appellant says that the court should have submitted the issue which is suggested in said charge. This complaint, to be considered on appeal, should have been specifically made by a proper assignment of error. The reasons for this ruling are stated in *Equitable Life Assurance Co. v. Maverick*, 2 Texas Law Journal, 775, 9 Texas Ct. Rep., 225.

This and the eighth assignment are similar, and it may be contended that each of these assignments sufficiently points out as error that the court failed to give a proper charge on the issue indicated in these refused charges. If the assignments be so construed then they complain of two distinct matters, one that there was error in refusing the particular charges, and the other that the charges being asked, they amounted to a request for the submission of the particular issue and there was error in not in some way submitting the matter. This construction would be fatal to the assignment under the rules.

The fifth assignment refers to another refused charge, which was to the effect that the alleged misdescription (describing the lot as No. 4) must not have been known to either of the parties, in order to present a case of mutual mistake, and that unless such mutual mistake as above



defined is shown by a preponderance of evidence, defendant was entitled to a verdict. The charge was calculated to induce the jury to find for defendant if either party knew that the deed described the lot as No. 4. This might be and yet the defendant, as well as Mrs. Lowenstein, may have thought and intended that, by the deed, he was reconveying the lot which had been deeded to him by Lowenstein and wife, in which event it would nevertheless be a case of mutual mistake. The court more correctly charged that "if the jury found from a preponderance of the evidence that the second of said deeds was executed by defendant in an attempt to reconvey to Mrs. Lowenstein the property described in the first of said two deeds, and that the parties to said second deed, to wit, the defendant and Mrs. Lowenstein, were at the time of its execution under the impression that the property therein described was the same property which had been conveyed to the defendant by the first of said deeds, then plaintiffs are entitled to a verdict, but if you fail to so find then the defendant is entitled to a verdict."

Defendant's requested charges numbers 4 and 5 were as follows: "If you believe from the evidence that Rosa Lowenstein knew at the time of the execution by Metcalfe of the deed to her of date May 18, 1898, that same conveyed lot 4, and not lot 3, then plaintiff can not recover, and you will find for the defendant."

"If you believe from the evidence that in executing the deed of May 18, 1898, to Rosa Lowenstein, said Metcalfe knew that same conveyed lot 4, and not lot 3, in block 3-827, city of Dallas, then you are told that plaintiffs have failed to prove any mistake mutually made by said Metcalfe and said Rosa Lowenstein, and you will find for defendant."

The same fault exists in these charges as in the charges above discussed under the fifth assignment, and for the same reasons assignments 6 and 7 are overruled. The charge given as above copied sufficiently presented the issue.

The refused charge mentioned in the eighth assignment reads as follows: "If you believe from the evidence that the original conveyance of lot 3 in block 3, subdivision of block 827, was made by Rosa Lowenstein and husband to W. A. Metcalfe as part payment of the debt due him by the said Lowenstein, and was accepted by him as such, and that at and prior to said conveyance there was no contract by said Metcalfe to reconvey to Rosa Lowenstein, you will find for defendant." The expression "as part payment of the debt due him" is unfortunate for the charge. It was, to say the least, calculated to lead the jury to understand from the court that a debt existed, and therefore it was properly refused.

The court also refused to give an instruction as follows: "You are instructed that the burden of proving mutual mistake is upon the plaintiffs, and unless you find the same is proved by a preponderance of the evidence, you will find for defendant." This was in effect what the court charged, as will be seen from the paragraph of the charge which is quoted in connection with the fifth assignment.



The twelfth assignment reads as follows: "The court erred in the following paragraph of its main charge to the jury: "If you find from a preponderance of the testimony before you that the second of said two deeds was executed by defendant in an attempt to reconvey to Mrs. Rosa Lowenstein the property described in the first of said two deeds, and that the parties to the second deed, to wit, the defendant and Mrs. Rosa Lowenstein, were at the time of the execution of said deed under the impression that the property therein described was the same property which had been conveyed to the defendant by the first of said two deeds, then plaintiffs are entitled to a verdict."

There are two propositions advanced under this assignment. One is that the term mistake in its bearing on this remedy is not synonymous with "impression." This criticism we overrule, as we consider the charge presents clearly and accurately the issue of mistake as made by the evidence. The other proposition we copy: "A suit for the correction of an instrument alleged to be incorrect presupposes and is predicated upon the existence of a valid contract between the parties, which contract, because of the alleged mistake, is not embodied in the instrument sought to be reformed. Such a contract must be definite as to terms, lawful in effect, and based upon a consideration. If it lack any of the essentials of a valid contract, the suit for reformation must fail."

This proposition in reality complains of the omission to submit in connection with this instruction the issue of the existence of a valid contract to reconvey the property. This assignment says nothing about such omission and the proposition is not supported by the assignment.

The facts seems to be that the court proceeded upon the theory that the deed was subject to reformation for mistake, and we can not revise this assumption with reference to the testimony without an assignment which makes that question. The charge complained of undertook to submit the issue of mistake, and in this was correct. Its correctness in this respect is all that can be brought into question under the assignment.

The court would not from the testimony have been warranted in giving a peremptory instruction in favor of the defendant, nor did it err in overruling the motion for a new trial for want of evidence to support the verdict

*Affirmed.*

ON MOTION FOR REHEARING.

We have concluded that there is error in the opinion filed in reference to the twelfth assignment. We recognize the principle that if the deed sought to be corrected was a mere gratuity on the part of Metcalfe, equity will not entertain a bill for its correction. There was an issue as to whether he was or not under obligation to reconvey the lot to Mrs. Lowenstein. This issue was ignored by the charge complained of. It instructed the jury to return a verdict for plaintiff if the fact appeared



that she and Metcalfe were, at the time of the execution of the deed sought to be corrected, under the impression that it conveyed to the latter the property that had been conveyed by the deed from her to Metcalfe. The charge in effect was a charge against Metcalfe on the issue above referred to, and under the following decisions he could complain of the error, under a general assignment alleging error in the particular charge. *Cotton States Building Co. v. Jones*, 94 Texas, 497; *Scott v. Railway Co.*, 93 Texas, 625; *Seffel v. Telegraph Co.*, 65 S. W. Rep., 897. By reference to 60 S. W. Rep., 589, it will be seen that the assignment of error in the first of the above cases was a general one concerning the charge complained of. Therefore the motion is granted and the judgment reversed and the cause remanded.

*Granted. Reversed and remanded.*



E. EDELSTEIN v. J. M. BROWN ET AL.

Decided April 27, 1904.

**1.—Illicit Relations—Presumption—Burden of Proof.**

The presumption is that illicit relations between parties, one of whom is married, continued illicit after dissolution of the marriage, and where it is sought to show that the illicit relations have changed to legal ones the burden rests upon the one attempting to show such change.

**2.—Same—Common Law Marriage—Community Property.**

Illicit relations began between parties while the woman had a lawful husband living and continued after his death, the parties living apart and seeing each other only occasionally. These relations existed for several years until they finally took up their abode together and represented themselves as man and wife. Such state of facts held insufficient to show a common law marriage, at least until they agreed to live together, and heirs of the woman by a former legal marriage could not recover any interest in land as community acquired before such agreement.

ON MOTION FOR REHEARING.

**3.—Common Law Marriage—Presumption—Cases Explained.**

*Yates v. Houston*, 3 Texas, 442; *Bonds v. Foster*, 36 Texas, 68; *Bull v. Bull*, 29 Texas Civ. App., 364, explained as in harmony with the rule that where the original relations between parties were illicit a change in that relationship must be shown before the presumption of a common law marriage can arise.

Appeal from the District Court of Camp. Tried below before Hon. J. M. Talbot.

*M. M. Smith, E. A. King, and Morris & Crow*, for appellant.

*W. R. Heath and Sam D. Snodgrass*, for appellees.

FLY, ASSOCIATE JUSTICE.—This is a suit instituted by J. M. Brown and L. B. Brown against appellant to recover their mother's (S. C. Edelstein's) community interest in certain property held by appellant. Appellant answered denying that he had ever been married to S. C. Edelstein. The case was tried without a jury and judgment rendered for appellees.

Appellees are the offspring of Mrs. Edelstein's marriage with J. H. Brown, from whom she was divorced on February 9, 1889. On March 24, 1889, she was married to Charles Kraus, from whom she was divorced on June 19, 1890, and on September 30, 1891, she married Charles E. Rupp, from whom she separated in about three months. She obtained a divorce from Rupp on December 16, 1895. During the latter part of 1893 and in 1894 and 1895 S. C. Edelstein lived in San Antonio, Waco, and Dallas, and during the years 1896, 1897 and part of 1898 she lived in Waco and Marlin. In all of these places she was visited by appellant and they occupied the same room and cohabited with each other. In all of those places before and after the divorce was obtained from Rupp, appellant and Edelstein held themselves out as man and wife. In the fall of 1898 Mrs. S. C. Edelstein moved to Pittsburg



and took up her abode with appellant and they lived together as man and wife until her death. Appellant introduced her as his wife in Pittsburg, had real estate conveyed to her, and had her to join him in the conveyance of real estate as his wife. She was known as Mrs. Edelstein in San Antonio and other places before she obtained her last divorce and continued to be known by that name after the divorce.

During all the years from the time of appellant's first intimacy with Mrs. Edelstein he was a citizen of Camp County, and resided and did business in Pittsburg, but paid numerous visits to Mrs. Edelstein in the different places in which she lived and cohabited with her. Mrs. Edelstein died on November 22, 1902. Appellant closed out his business in May, 1903. The trial judge found that a common law marriage existed between appellant and the woman from the time that the divorce was granted on December 16, 1895, until her death.

Marriage is a civil contract, the consent of the parties to it being all that is required by natural public law. It is true that in most if not all of the States of the Union there are statutes regulating the manner of forming the marriage contract providing for the performance of ceremonies, and naming those persons who can perform the ceremonies or celebrate the rites of matrimony, but it is held in a number of the States that in the absence of positive statutes declaring all marriages void that are not performed as directed by law, any marriage made according to the common law would be a valid marriage. Such marriages may be proved by reputation, declarations and conduct of the parties, and other circumstances usually accompanying that relation. That they addressed and introduced each other as man and wife, their reception among their associates as such, joining each other as man and wife in the conveyance of property, the assumption by the woman of the man's name and their cohabitation, among other circumstances, form evidences of marriage.

To constitute a common law marriage there must be an agreement express or implied to become man and wife and while cohabitation is one of the evidences of marriage, cohabitation without the agreement to become man and wife does not raise that relation. Without such agreement antedating it, it is unlawful and does not form a part of the marriage contract. Illicit intercourse, although extending over a long period of time, does not consummate nor perfect a marriage dependent for completion on cohabitation. Rodg. on Dom. Rel., sec. 96; Cuneo v. De Cuneo, 24 Texas Civ. App., 436, 59 S. W. Rep., 284.

The law, as construed in Texas, will indulge every reasonable presumption in favor of marriage and legitimate cohabitation, but it is the rule that the presumption does not obtain where the relations of the parties originate in immorality and shame. When persons take up a relation to each other in violation of decency and the demands of society the law will not stultify itself by presuming a marriage in the absence of affirmative proof that they have repented of their conduct and have changed the character of their cohabitation either by a statutory marriage or an agreement to assume the relation of man and wife. Nor



is the presumption of a continuance of the illicit relations affected by a removal of a disability of marriage which existed when the relations began, unless there is a visible change in the manner of living. Where it is sought to show that the illicit relations have changed to legal ones the burden rests upon the party attempting to show such change. Rodg. on Dom. Rel., sec. 99.

The evidence clearly showed that S. C. Edelstein was the paramour of appellant for at least two years before she obtained the divorce, whom he visited in the different cities in which she sojourned. According to the testimony of one of the appellees, he visited his mother in San Antonio in 1893 and found her living with Edelstein as his wife, and he said from that time she was called Mrs. Edelstein. This was at a time when she was the wife of Rupp. Shortly after that time she removed to Dallas, where she lived until 1895, when she went to Waco. She then moved to Marlin, where she stayed until the fall of 1898, when she went to Pittsburg. Before the divorce appellant went to see her frequently and spent two or three days with her and afterwards there was no change. They represented that they were man and wife before the divorce was granted, just as they did afterwards. Appellant's visits to Mrs. Edelstein were made about once a month.

The first evidence of a change from the illicit relations existing between the parties was when Mrs. Edelstein moved to Pittsburg, in 1898. Up to that time there was nothing to indicate that they desired to mend the error of their way, forsake the shameful lives they had been living, and repair their wrong so far as they could by entering into the marriage relation. The relations had been conceived in sin, and continued in utter disregard of the laws of the State for years. There was no break in the tenor of their lives after the divorce to indicate that it had been procured for the purpose of marriage. That it was not so intended appears from the fact that they lived at a distance from each other, contrary to the usual habit and custom of married people. Their mode of life must necessarily carry with it such a grave suspicion as to its continuance in the illicit manner in which it began that those seeking to show a common law marriage must be required to prove more than declarations of the parties and cohabitation to accomplish the result. The only reason that was offered for the parties living in different towns was that a house could not be procured, which was received from the mouth of Mrs. Edelstein while in Dallas. To sustain that reason it must be accepted as a fact that there was such a rush for houses in Pittsburg for three years that one of its citizens was compelled to keep his wife in several cities in Texas away from his home because he could not obtain a house there. There was no attempt to prove that such a condition of affairs existed. Every reasonable presumption should, in the interest of morality, be indulged in to support the marriage relation, but the doctrine can not be carried to such an extent as to transform the position of the mistress into the honorable



status of the wife. If there were children whose legitimacy was to be protected the law would look with tender compassion upon them and might not be so exacting in requiring proof of a change from an illicit to a legal relation, but it is only a question of money which the children are endeavoring to obtain from the surviving party. The very doctrine of community property had its inception in the theory that the man and wife are equal partners in the business of life and the acquired property is the product of their joint labors. No such theory has much to sustain it in this case prior to the latter part of 1898, when the parties appear to have turned their backs upon their lives of shame and to have assumed a decent relation towards each other.

The common law idea of making marriage of a connection which, although not denounced as unlawful by the statute on marriage, is in contempt and utter disregard of its requirements, has been carried far enough when all the evidence tends to prove a case upon which a presumption of marriage may be based, and to tolerate a loose system in regard to the matter will not have the effect desired by the doctrine of the common law, the protection of the offspring and the sustaining of the marriage relation, but will rob marriage of its sanctity and enthrone lewdness in the position sacredly held by the wife and lawful mother. When all form and public ceremony is abolished, and the woman who ignores the law and demands of society by cohabitating with a man is put upon the level of the pure and upright wife and mother, the marriage contract becomes one of little importance and less sacredness, to be set aside as easily as it was assumed. Property rights will be disturbed and their tenure made to hang in uncertainty and doubt. The fear of these results has caused the legislatures and courts of a number of the States to denounce common law marriages and permit none to stand except those entered into with the formalities prescribed by statute. Rodg. on Dom. Rel., sec. 91, and note 2. The writer of this opinion is of the belief that the rule in those States is the safer plan, and as an original proposition would not accede to the common law doctrine. Even with the common law rule indorsed by the courts of Texas, it will be the policy of this court to require strict and clear proof of marriage consummated in any other mode than by a compliance with our statutes.

There is no evidence tending to show that the parties supposed that they were married. Mrs. Edelstein had been so often married according to the statute that she must have known that her relation with Edelstein was obnoxious to law and decency. One witness swore that she said she had been married to appellant. If the parties knew that the relation was not that of marriage they could not have intended it to be marriage. If marriage was not intended by them, if their minds did not meet on that proposition, they were not man and wife. *Cross v. Cross* (Mich.), 21 N. W. Rep., 309.

In the case above cited the man had introduced the woman as his wife and treated her as such and a child had been born to them. But



there was secrecy and a living apart for a time, and there were other facts inconsistent with marriage. The court said: "We can not avoid the conclusion that whatever these parties may have done to keep up appearances, neither of them ever supposed they were married. Their relations were evidently more intimate than those of unmarried persons should be, but they did not produce, even among strangers and other third persons, any general conviction that they were husband and wife. The real question is how they themselves regarded their relation, and reputation is only important as circumstantial evidence of this." The above language is quoted and approved in the case of *Terry v. White* (Minn.), 59 N. W. Rep., 1013.

As bearing upon the facts of this case we refer to the following authorities, in addition to those already cited: *Appeal of Reading Ins. Co.* (Pa.), 6 Atl. Rep., 50; *Collins v. Voorhes* (N. J.), 22 Atl. Rep., 1054; *Jackson v. Jackson* (Md.), 3 Atl. Rep., 758; *Gall v. Gall* (N. Y.), 21 N. E. Rep., 106; *Voorhees v. Voorhees* (N. J.), 19 Atl. Rep., 172.

We are of the opinion that the facts of this case do not prove a marriage between appellant and Mrs. Rupp, at least until the fall of 1898, when she went to Pittsburg to live with him, and no property acquired before that time had the community character stamped upon it.

If there were testimony which would enable this court to separate the property acquired after Mrs. Edelstein moved to Pittsburg from that acquired before, we might render such judgment as the trial court should have rendered, but the record does not supply the data upon which to base a judgment.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

#### ON MOTION FOR REHEARING.

The testimony of one of the appellees sustains the conclusion of this court that the relation between appellant and Mrs. Edelstein began at a time when Rupp, her lawful husband, was living, and that this relation continued until the latter part of 1895, over two years. There was nothing to indicate a change in that relation after the divorce was granted, and we adhere to the opinion that where the proof shows that the original relation was criminal there must be some evidence of a change in that relationship before the presumption of a common law marriage can arise. The facts in the cases cited by appellees, as holding a contrary doctrine, do not bring them in the class of case under consideration, as we think a brief review of them will show.

In the case of *Yates v. Houston*, 3 Texas, 442, the woman supposed she was legally married, and there was no evidence that the first wife was living when the couple began cohabitation and the presumption was held to prevail that she was dead at that time. At the time that the man and woman moved to Texas all the evidence indicated that they



were married, and the court held that it was not proper to go back of the time when they first lived in the colony to ascertain their relation. The court did not hold that there should not be some evidence of a change from the illicit relations, if they ever existed, but hold that there was such evidence.

The case of *Bonds v. Foster*, 36 Texas, 68, was evidently not well considered, and the facts do not place it on a footing with this. That case goes to the extent of declaring that a common law marriage contracted between a white man and a negro woman in Ohio was legal in Texas under the fourteenth amendment to the Federal Constitution, although it was a felony for a white person and negro to intermarry in Texas, or to continue to cohabit with each other in this State when married in another State.

In the case of *Bull v. Bull*, 29 Texas Civ. App., 364, 68 S. W. Rep., 727, decided by the Court of Civil Appeals of the Second District, the woman, believing that she had been divorced by the laws of Alabama from her former husband, married another man. There is not a word in that decision that can be tortured into a ruling that a relation begun in disregard of law will be presumed to have changed its character without some evidence to indicate such change.

The evidence shows unquestionably that appellant at no time from 1893 to 1902, when his wife died, changed his residence from Pittsburg to any other point. The evidence indicates no change in their relations to each other until she removed to Pittsburg, if it ever did take place. One of the appellees, a son of Mrs. Edelstein, testified as follows: "During her residence in San Antonio and Dallas I understood they were married. E. Edelstein visited her frequently at those places, and would remain a few days at each visit, and would return to his place of business at Pittsburg, Texas." Again the witness said: "In the latter part of 1893 my mother was living in San Antonio, Texas, with a Mrs. Kitchens, and I was in Houston, Texas, at that time. I received a letter from her to come home. I went and found the defendant and my mother living together as man and wife at San Antonio, from which time she was called and known as Mrs. Edelstein. She lived a short time after this in San Antonio and moved to Dallas, Texas, where she lived till some time in 1895, when she moved to Waco. During her said residence in San Antonio, Waco, Marlin and Dallas, I understood that they were married. E. Edelstein, the defendant, visited her frequently at those places, and would remain a few days at each visit, and would return to his place of business." This comprised all of the time up to the time when Mrs. Edelstein moved to Pittsburg in 1898. It is true that the witness stated that they kept house after the removal from Dallas, but the visits to her by Edelstein were made just as they were when she boarded, and during at least one-third of the time Mrs. Edelstein had a legal husband in the person of Rupp. Another witness for appellees, V. C. Saufley, testified that he worked for appellant in Pittsburg up to 1898, and that he often



heard him speak of his wife who lived in Waco and Marlin, which clearly indicates that appellant was a resident of Pittsburg. It was also shown that frequent letters were written by appellant to Mrs. Edelstein at Waco. They were mailed at Pittsburg.

Mrs. Sims, who testified as to the reason given by Mrs. Edelstein for not living with appellant in Pittsburg, was a witness for appellees, and the testimony was given in response to questions addressed to her by appellees. Her evidence was not contradicted, and must be taken as true.

The foregoing was testimony offered by appellees, and in addition thereto appellant swore that he was never married to Mrs. Edelstein, and that they never at any time agreed to be man and wife, and that he knew and visited and cohabited with her. As late as 1902, a short time before her death, Mrs. Edelstein told Mrs. Monzison that she was not married to appellant, and asked if witness could suggest some way in which she could induce appellant to marry her. This court has gone to the utmost bounds in sustaining the marriage relation between the parties when it intimated that the marriage relation may have begun when Mrs. Edelstein took up her residence in Pittsburg. The sanctity of the marriage relation is so essential to the preservation of morality and decent government that it is with hesitation that this court goes to that extent.

This court is requested by appellees to take the evidence of one of them as settling the character of the property held by appellant. In view of the fact that other testimony shows that appellant must have paid for some of the property purchased by him after Mrs. Edelstein moved to Pittsburg, with separate funds, we can not hold that the witness was right in his deductions and the matter is left in such doubt that we can not determine what of the property belonged to the community.

The motion for rehearing as well as the motion for additional conclusions of fact are overruled.

*Overruled.*



## JAMES KETTLE V. CITY OF DALLAS.

Decided April 27, 1904.

**City Charter—Street Improvements—Improvement Districts—Tax—Home—stead.**

The amendment to the charter of the city of Dallas authorizing the creation of improvement districts by the city council and the levy of a tax against property owners in such improvement districts to meet expenses of improving streets was constitutional, and a tax was valid which was levied to pay for street paving though the property taxed was used as a home—stead.

Appeal from the District Court of Dallas. Tried below before Hon. Richard Morgan.

*A. B. Flanary*, for appellant.

*W. T. Henry and Moroney & Simpson*, for appellee.

NEILL, ASSOCIATE JUSTICE.—The Twenty-seventh Legislature, by an amendment of the charter of the city of Dallas, authorized the creation, within its corporate limits, of improvement districts by its common council. By the act it is provided that “whenever the city council shall deem it necessary to grade, raise, repair, macadamize, remacadamize, pave, repave or otherwise improve any avenue, street or alley or portion thereof, \* \* \* and shall be of the opinion that certain real estate abutting or in the vicinity of such proposed improvements will be specially benefited thereby, and shall deem it just for the owner or owners of such real estate so specially benefited to pay the cost of such proposed improvement or improvements, or a portion of such costs, the city council shall by resolution so declare, such resolution to define the limits within which all real estate will be so specially benefited by such proposed improvements,” and that “all real estate within such limits may be finally established as hereinafter provided, shall be known as improvement districts, and, when so established, shall be designated by a certain number.”

That “an improvement district shall include all such real estate as in the opinion of the city council will be specially benefited by such proposed improvement and improvements in proportion to its value, and to an amount at least as great as its pro rata of the costs of such proposed improvements, or so much of such cost as shall be paid solely by the owners of the real estate within such improvement district.”

That “such resolution of the city council, hereinbefore provided for, shall also specify the general nature and character of the proposed improvement or improvements and shall direct the city engineer to prepare and submit to the city council an estimate of the costs of the same.”

That “such resolution of the city council, hereinbefore provided for, shall direct the city tax assessor to report in writing to the city council the total assessed value of all the real estate within such improvement



district, according to the last annual assessment. In case the records of the city tax assessor do not show the assessed value of all real estate within such improvement district, the city tax assessor shall estimate the actual value of said real estate within such improvement district whose assessed value is not separately shown by his records, and shall include such estimated value in his report hereinbefore provided for."

That "the reports of the city engineer and the tax assessor hereinbefore provided for shall be advisory only, their purpose being to furnish the city council with information that will aid the city council in finally determining whether or not such proposed improvements shall be made, and how and by whom the costs of the same shall be paid; and no errors or omissions, in such reports, or either of them, shall vitiate any of the proceedings of the city council, or any proceedings that may be had under the order or authority of the city council."

That "after receiving and considering the reports from the city engineer and city tax assessor hereinbefore provided for, if the city council is then of the opinion that the proposed improvement or improvements shall be made, the city council shall direct the city engineer to prepare a complete specification for the same, which specification shall prescribe the manner in which the work shall be done, and the nature, quality and character of the materials to be used, and shall also contain such other provisions as the city council shall deem proper. When such specifications are submitted to the city council by the city engineer, they shall be amended by the city council to whatever extent they may deem proper, subject to the provisions of this act, and may then be adopted by the city council. If a majority in value of the resident real estate owners within any such improvement district shall in writing petition the city council to make any such improvement or improvements according to specifications or of materials designated in such petition, or shall by petition specify how the cost of the same shall be taxable against the owners of real estate within such improvement district shall be paid, within the authority and limitations prescribed by this act, it shall be mandatory on the city council, if such improvement or improvements shall be made at all, to comply with such petition, and, in that event, such improvement or improvements shall be made of the materials and according to the specifications designated in such petition, the city council to have the power to add such details and other provisions to such specifications, not inconsistent with said petition, as the city council shall deem proper."

That "before the construction of such improvement or improvements shall be finally ordered, and subject to the provisions of this act, the city council shall by resolution or otherwise determine how the costs of the same shall be paid, whether wholly by the owners of the real estate within such improvement district, or in part by such owners and in part out of the general revenues of the city or other revenues or resources that may be properly appropriated for that purpose."

That "after the proceedings hereinbefore provided for the city council



shall cause at least ten days' notice to be given to all persons and corporations owning any real estate within such improvement district, or any interest in such real estate, and any and all persons or corporations in any way interested in such proposed improvement or improvements, or in any manner in which the cost of the same is paid, which notice shall briefly state the nature of such proposed improvement or improvements, and shall refer to the specifications for further particulars, and shall state the limits of such improvement district, and shall notify all such persons and corporations to file in writing with the city secretary any objection that they may have either to the making of such improvement or improvements, or to the manner in which the cost of the same is to be paid, or to the manner in which said improvement district is constituted, or any other objections any such person or corporation may desire to present. Such notice shall state the time when such objections shall be filed, which time shall be after the final publication of such notice, and such notice shall be served by causing the same to be published for at least ten days in a daily newspaper of general circulation in the city. A newspaper published on all week days but not on Sunday shall be deemed a daily newspaper within the meaning of this act."

That "at any regular or adjourned meeting of the city council, or any special meeting called for that purpose, after the lapse of the time provided for receiving objections as hereinbefore provided, the city council shall hear and determine all objections that may have been filed, and such hearings may be continued from time to time until all such objections are fully considered and disposed of. At such hearing or hearings full opportunity shall be given to the parties filing such objections to present the same to the city council, together with any proper evidence in support of such objections that they may desire to offer, and the city council shall thereupon make such orders and directions on such objections as may be just and proper, and any and all such objections not so presented shall in any subsequent judicial or other proceedings be considered as waived."

That "if it shall appear from such objections filed that the owners of two-fifths in value of real estate within such improvement district are opposed to making of such improvement or improvements, the cost of which is to be charged in whole or in part against them, in that event the city council shall so declare, and shall not order said improvements to be made. If a majority in interest shall fail to object, in the time and manner hereinbefore specified, the city council shall have the power to order such improvement or improvements made, and to provide for the payment of the cost of same as provided by this act, and as otherwise provided in said city charter."

That "if it shall appear upon the hearing of such objections that any real estate within such proposed improvement district will not be specially benefited by such proposed improvement or improvements in proportion to its value, and to an amount at least as great as its pro rata



of the cost of such proposed improvement or improvements (or its pro rata of so much of said cost as is to be paid by the owners of the real estate within such improvement district), in either of such events such real estate shall be excluded from such improvement district, and the remaining real estate shall be constituted and established as such improvement district. If no such objection shall be made, or if no such objections that are made shall be sustained, in either of such events the real estate within the limits originally proposed shall be constituted and established as such improvement district."

That "no real estate of any kind within such improvement district shall be exempt from any of the taxes and assessments and charges authorized by this act."

That "after hearing and disposing of any and all objections, remonstrances and petitions that may have been filed in accordance with the preceding sections of this act, and after finally settling the limits of such improvement district, and after the specifications for such improvement or improvements, and after determining how the cost of the same shall be paid, the city council shall order an advertisement for sealed bids for the work. \* \* \* The contract for the work shall be awarded by the city council to the bidder whose bid is in their judgment most advantageous to the city, and to the property owners who are to contribute to the payment of the cost of the work. The city council shall have power in its discretion to reject any and all bids, or parts of bids, and shall reject any bid or bids if requested so to do by the written petition of the majority, in value, of the real estate owners within such improvement district, and one week shall be allowed after opening bids for filing of any such petition or petitions."

That "at or before the time the contract for the work is awarded the city council shall, by ordinance or resolution, make due and proper provision for payment of the cost thereof. The amount, if any, to be paid by the city at large shall be duly appropriated for that purpose out of the available funds or resources properly applicable thereto; and the amount to be paid by the owners of real estate within such improvement district, together with all interest that may accrue thereon, and the cost of levying, assessing and collecting taxes on such real estate, for the payment thereof, shall be declared a lien upon such real estate, and to be levied, assessed and collected from time to time, according to the assessed value of such real estate, until such amount and all interest thereon shall be paid and discharged."

The act then, after giving the city the right to issue either street improvement, district warrants or street improvement district bonds in payment of so much of the cost of the work as may be chargeable against the owners of real estate within such improvement district, provides that "such warrants or bonds may be issued direct to the contractor in payment for the work, or such warrant or bonds may be sold and the proceeds paid the contractor in payment for the work;" and that "whether bonds or warrants are issued, in either event no tax



shall be levied for any one year on any real estate within such improvement district for the purpose of paying the same in whole or any interest thereon, or for the purpose of providing for interest and a sinking fund, which, including all other city taxes, shall exceed two and one-half per cent on the assessed value of such real estate; but, for the purposes aforesaid, taxes, including all other city taxes, may be annually levied to an amount not exceeding two and one-half per cent of such assessed value, without any vote of qualified voters or taxpayers, except as provided by this act."

That "bonds authorized by this act to be issued shall be payable, principal and interest, at such time and place and shall bear such rate of interest as the city council may direct. They shall state the purpose for which they are issued, and the number of the improvement district on account of which they are issued. And shall not be issued until the amount chargeable against the real estate within such improvement district shall be ascertained, and shall not be issued in excess of such amount. Due provisions shall be made to assess and collect annually, upon and from the real estate within such improvement districts, a sufficient amount to pay the interest thereon and create a sinking fund of at least one per cent thereon."

That "warrants authorized by this act to be issued may be issued, subject to the provisions of this act, in such denominations and bearing such rate of interest as the city council shall direct. They may consist of different series, each series to mature annually until they become due. Such series shall be so arranged that so far as practicable, in the judgment of the city council, the annual charge for interest and principal shall be approximately the same. Such warrants may be divided into as many annual series as the city may direct. They shall state the purpose for which they are issued, and the number of the improvement district on account of which they are issued. They shall not be issued until the amount chargeable against the real estate within such improvement district shall be ascertained and shall not be issued in excess of such amount. Due provision shall be made to assess and collect upon and from the real estate within such improvement district a sufficient amount to pay the principal and interest on such warrants as they mature, which amount shall be not less than sufficient to pay the interest and at least 2 per cent of the total principal of said warrant. Such bonds or warrants shall be in such form as the city council may direct or approve, subject to the provisions of this act, and shall be signed by the mayor and attested by the city secretary and seal of the city, and shall be assignable, negotiable and collectible in all respects as other valid obligations of the city."

That "the provisions of the city charter of the city of Dallas limiting the bonded debt of the city shall not apply to street improvement district bonds or warrants issued under the provisions of this act."

That "all laws requiring the registration of city bonds with the Comptroller of the State, and the approval of such bonds by the Attor-



ney-General of the State, and regulating and determining the effect of such registration and approval, shall apply to street improvement district bonds issued under the provision of this act."

Under this act the city of Dallas constituted an improvement district of lots fronting and abutting in a portion of Elm Street to provide for the cost of laying an asphalt pavement on said portion of Elm Street, and let a contract to Barber Asphalt Paving Company to lay the pavement, the street railway company on said street to pay the costs of the pavement between the rails and tracks and for two feet on each side, as provided by the city charter, the city to pay one-third and the property owners to pay two-thirds of the balance of the costs, the amount payable by the property owners to be raised by an ad valorem tax on the property within such improvement district, as provided by the amendment of the city charter above quoted.

The appellant is a married man and the head of a family, and owns a lot fronting fifty feet on the south side of Elm Street and extending back a depth of one hundred feet, in said improvement district, which was when said district was created and is now his homestead, being actually occupied by him and his family as a home, as well as used by him as his place of business. According to the last assessment of the city of Dallas, said lot, without improvements, is assessed at \$1700 and the improvements at \$2250, and such improvements are permanent and valuable, and are actually worth their assessed value.

This suit was brought by appellant against the city of Dallas and the Barber Asphalt Paving Company to enjoin the assessment and collection of the tax upon his homestead situated within said improvement district, upon the ground that the amendment of the charter upon which the proceedings were had creating the improvement district, and the proceeding of the council thereunder in taxing and charging any part of the cost of the improvement of the street against his homestead, are unconstitutional and void and cast a cloud upon his title to such property. In his petition the appellant prayed that all of said proceedings be declared null and void, that the levy, assessment and collection of all taxes under said proceedings be enjoined.

The case was tried by the court and the relief prayed for denied and plaintiff's petition dismissed.

From such judgment this appeal is prosecuted, and the matters and facts as above stated by us are, for the purpose of this appeal, agreed upon by the parties.

*Opinion.*—The only question presented for our determination in this case is the constitutionality of the amendment of the city's charter under which the proceedings of the city council creating the improvement district, and its action in subjecting appellant's property to the tax assessed against it by virtue of the provision of said amendment, were had.

Before proceeding to a decision of this question we will state some



general principles of law we deem applicable, which will govern us in its determination.

It is for the Legislature to determine all questions of State necessity, discretion or policy involved in ordering a tax and in apportioning it (*Thomas v. Gay*, 169 U. S., 264), and to make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. This results from the power and discretion of that coordinate branch of the government. The judicial power can not legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the State. *Merriwether v. Garrett*, 102 U. S., 472; *Hardenburg v. Kidd*, 10 Cal., 402. What property shall be embraced within a municipal corporation or taxing district, and whether it shall be taxed for municipal purposes, are political questions to be determined by the law-making power, and an attempt by the judiciary to revise the legislative action would be a usurpation. *Norris v. City of Waco*, 57 Texas, 635. It is only when the Legislature has abused its powers and transcended its legislative function by the enactment of that which is called a tax, but which is not such in fact, that the department of the judiciary can call in question the legislative enactment. There are personal and private rights, involving individual liberty and individual property, subject to invasion by the community or other individuals. These are protected by the Constitution of the State, and by a system of fixed laws defining those rights and appointing the remedies by which they are to be preserved and guarded even against the combined force of the whole community. And it is for the judicial department to see that the protection guaranteed by the Constitution to personal and private rights is enforced and not invaded even by the legislative branch of the government. But so long as the legislation in form and substance conforms to the Constitution, and is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as no constitutional limitations are exceeded or the constitutional right of the citizen violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority, and the courts, as well as all others, must obey. Taxes may be and often are oppressive to the persons and corporations taxed; they may appear to the judicial mind unjust and even unnecessary, but this can constitute no reason for judicial interference. *Veazie Bank v. Fenno*, 8 Wall., 533; *Davidson v. New Orleans*, 96 U. S., 97; *Merriwether v. Garrett*, 102 U. S., 472.

"In large cities pavement becomes absolutely essential, and must be made by the owners of adjoining property, if not provided for by the public. The ability to make profitable use of their property depends upon it, and they might, perhaps, be safely left to provide for it at their own expense, if all property was improved and occupied; and if, when individual action was relied upon, there was any other method of insuring uniformity of action in the time, manner and expense of im-



proving the streets. The necessity, however, for public supervision and direction is made imperative by the likelihood of such diversity of individual views as would prevent conformity and co-operation among property owners; and the necessity for making the improvements a local burden is almost equally imperative, since it is not to be supposed that the State at large would understand and appreciate the absolute need of an improvement which was specially important to comparatively few persons.

"Considered as a city the expense of paving a street may be levied upon the whole city, or a system of improvement may be resorted to analogous to that which is adopted in the construction and working of highways in general; that is to say, the cost of any such work may be assessed upon that part of the city which receives peculiar benefits from it. The latter method would require either a division of the city into taxing districts for several local improvements within it, or the creation of a special taxing district for each improvement, setting apart for the purpose that portion of the city which was believed to receive the special benefits. These special taxing districts are most common, and they are either fixed after an examination of the circumstances of each particular case with a view to ascertaining how far the special benefits extend and what property shares in them, or they are determined by some general rule which, though it may not be strictly just in any particular case, will in the main, it is supposed, apportion all such expenses with reasonable equality and fairness. Whether one course or the other shall be adopted must be determined by competent legislation." Cooley on Taxation, 3 ed., 234.

The power to determine what shall be a taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions. This principle, says Judge Cooley, the courts assert with great unanimity and clearness. The Legislature judges finally and conclusively upon all questions of policy, as it may also upon all questions of fact which are involved in the determination of a taxing district. Cooley on Taxation, 3 ed., 336. Such districts may be as numerous as the purposes for which taxes are levied. The district for a single highway may not be the same as that for the schoolhouse located upon it. It is not essential that the political districts of the State shall be the same as the taxing districts, but special districts may be established for special purposes wholly ignoring political divisions.

It is held by the Supreme Court of the United States "that it is within the power of the Legislature of the State to create taxing districts, and to charge the costs of local improvements, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of that court, in *Norwood v. Baker*, 172 U. S., 269, 43 L. Ed., 443, to hold otherwise." *Webster v. Fargo*, 181 U. S., 394, 45 L. Ed., 912; *Shumate v. Heman*, 181 U. S., 394, 45 L. Ed., 922; *Farrell v. West*



Chicago Park Com., 181 U. S., 404, 45 L. Ed., 924; Wormley v. Dist. of Columbia, 181 U. S., 402, 45 L. Ed., 921.

But to uphold the legislation under which the proceedings sought to be enjoined in this case were had, it is not necessary that the powers of the Legislature be extended as far as it was sanctioned by the Supreme Court in Webster v. Fargo and other cases above cited. But it may, so far as this case is concerned, be brought within the rule "*that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.*" 2 Dill. Mun. Corp., 4 ed., p. 935, sec. 761. And this seems to be in accordance with the views expressed by the Supreme Court of this State in Storrie v. Cortes, 90 Texas, 283. Upon the whole, to use the language of the Supreme Court of Indiana in Adams v. Shelbyville, 49 Law. Rep. Ann., 802, "We conclude \* \* \* that the principles applicable to assessments for local improvements are these: The Legislature may create a local taxing district for local improvement purposes, which includes part only of the property within the municipality. The Legislature may declare conclusively that only the property within the taxing districts shall be separately assessed on account of the local improvement within that district. Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits. The taxing district, as a whole, may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. The improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury. Property owners affected by the improvement within a taxing district are entitled to a hearing on the question of specific benefits." All the principles thus enunciated are present in the act of the Legislature under consideration, and everything required by the Legislature in the act has been complied with by the city council.

The legislative power of the State means all of the power of the people which may properly be exercised in the formation of laws against which there is no inhibition, expressed or implied, in the fundamental law. Since the municipal corporation can not exist except by legislative authority, and can exercise no power which is not granted by the Legislature, it follows that the creation of such corporations and every provision with regard to their organization, was the exercise of legislative power which inheres in the whole people, but by the Constitution is delegated to the Legislature; therefore, it is within the power of the Legislature to determine what form of government will be most beneficial to the public and the people in a particular community. It is a well settled principle of constitutional construction that the power of the Legislature can be restrained only by a prohibition, expressed or



implied, from some provision or provisions of the Constitution itself." *Brown v. City of Galveston*, 97 Texas, 1, and authorities cited. .

We can not perceive that any constitutional provision, either State or national, is violated or trenching upon by the act amending the charter of the city of Dallas or the resolution of the city in pursuance of such an amendment creating the improvement districts, or the proceedings had thereunder by the city council providing for the improvement and the assessment and levy of the tax to pay therefor. The appellant's property within the district is enhanced rather than depreciated in value by the provision in the resolution that requires the street railway company to pay the cost of paving between the rails and tracks of its railway and for two feet on either side. This provision is expressly authorized by the original charter of the city, and not affected by the amendment.

The constitutionality of a similar provision in the charter of the city of Houston was upheld by the Supreme Court of this State in *Storrie v. Street Ry. Co.*, 92 Texas, 129. It does not deprive appellant of his property without due process of law. It does not and can not exceed the amount of the ad valorem tax limit on property within cities exceeding ten thousand inhabitants; the tax within the improvement districts is equal and uniform upon all real property in the district. The property upon which it is assessed is enhanced in value beyond the amount of taxes assessed against it, and it being a tax, though it may be regarded as special, appellant's property, though it is his homestead, under section 50, article 616, of the Constitution, even as construed by the Supreme Court in *Higgins v. Bordages*, 88 Texas, 458, is subject to the levy and payment of such tax. If this be not so, then our homestead laws stand in the way of and prevent government from exercising the powers and functions for which it was inaugurated, and bars the way of progress and civilization.

The judgment it affirmed.

*Affirmed.*

Writ of error refused.



## • H. E. POST V. HOUSTON RICE MILLING COMPANY.

Decided April 28, 1904.

**Landlord and Tenant—Share in Crop as Rent—Agency.**

Plaintiff, a landlord, had a contract with his tenant for one-fifth of the rice raised on his place and notified defendant of such contract after the rice was taken there to be milled but before it was sold. Defendant having sold the rice turned all the proceeds over to the tenant upon the tenant's representation that he was plaintiff's agent and authorized to receive the money for the sale. Evidence considered and held insufficient to support defendant's plea that plaintiff, by his actions, induced it to believe that the relation of agency existed between him and the tenant.

Appeal from the County Court of Harris. Tried below before Hon. T. Blake Dupree.

*L. B. Moody*, for appellant.

*Ford, Stone & Ford*, for appellee.

PLEASANTS, ASSOCIATE JUSTICE.—Appellant brought this suit against appellee to recover the proceeds of the sale of 208 bags of rice, the property of appellant, and alleged to have been sold and the proceeds thereof wrongfully paid by appellee to one Riesnecker. The petition alleges that Riesnecker was a tenant upon the farm of appellant during the year 1902, and as such tenant raised on said farm a crop of rice; that 1040 bags of said rice were shipped by Riesnecker during the months of January and February, 1903, to appellee to be milled and sold; that under the rental contract between plaintiff and Riesnecker one-fifth of said rice, amounting to 208 bags, belonged to plaintiff as rent for his said farm; that after the rice was received by appellee company, and before the sale thereof, plaintiff notified said company that he owned one-fifth of said rice and instructed it to pay Riesnecker out of the proceeds of plaintiff's portion of the rice the sum of \$104 and to hold the remainder of such proceeds for plaintiff, and that defendant agreed and promised to comply with said instruction; that thereafter defendant sold said rice and received for the one-fifth interest therein belonging to plaintiff the sum of \$311.59, which amount it paid over to said Riesnecker; that defendant was only authorized to pay said Riesnecker the sum of \$104 as aforesaid, and that \$207.59 of the proceeds of said rice is due plaintiff by defendant, for which amount he prays judgment.

The defendant answered by general demurrer and general denial, and by special plea in which it is averred in substance that plaintiff by his conduct and representations held out Riesnecker as his agent, and defendant was thereby induced to believe and did believe that said Riesnecker was the agent of plaintiff and had authority as such to receive the proceeds of the sale of said rice.



The trial in the court below without a jury resulted in a judgment in favor of defendant.

The undisputed evidence shows that plaintiff owned one-fifth of the 1040 bags of rice which was shipped to appellee by Riesnecker as alleged in the petition, and that before the sale of said rice by appellee plaintiff notified it that he owned a portion of the rice and requested that his interest be protected, and that appellee agreed not to pay Riesnecker for plaintiff's portion of the rice until plaintiff and Riesnecker had adjusted certain claims which the latter was asserting against plaintiff. It was further shown that plaintiff and Riesnecker met at the office of appellee and it was there agreed by plaintiff that Riesnecker was to be paid \$104 out of plaintiff's portion of the proceeds of the sale of the rice. Some time after the agreement was had the appellee sold the rice and without any authority from plaintiff paid Riesnecker the full amount of the proceeds of such sale. There is no evidence to sustain appellee's plea that plaintiff did anything or made any representation which could have induced appellee to believe that it was authorized to pay Riesnecker any part of the proceeds of the sale of plaintiff's rice except the \$104. It is manifest from the testimony of appellee's agent who sold the rice and paid the proceeds to Riesnecker that he relied solely upon the statements of Riesnecker that the matters between himself and plaintiff had all been settled and that he was authorized to receive plaintiff's portion of said proceeds. Upon the undisputed evidence appellant was clearly entitled to a judgment for one-fifth of the amount received by appellee for the rice less the \$104 which he authorized appellee to pay Riesnecker, and the judgment of the court below is therefore reversed and judgment here rendered for appellant for said amount.

*Reversed and rendered.*



## MARY ROANE BUSTER ET AL. V. JOHN WARREN, SR., ET AL.

Decided April 29, 1904.

**1.—Land Certificate—Recital in, Not Conclusive—Grantee.**

A recital in an unconditional land certificate issued by a land board of a county that the grantee in the original certificate was dead and his administrator entitled to the unconditional certificate was not conclusive against those claiming as heirs of the original grantee where the evidence shows that he was not dead at the time the unconditional certificate was issued and had never sold the land. *Davis v. Bargas*, 88 Texas, 622; *Dick v. Malone*, 24 Texas Civ. App., 97; *Smith v. Walton*, 82 Texas, 547; *Clifton v. Hewitt*, 56 S. W. Rep., 132, distinguished.

**2.—Practice on Appeal—Excepting to Findings.**

A party who does not except to the findings of fact filed by the trial court can not attack such findings by cross-assignment on appeal. *Rev. Stats.*, art. 1333.

**3.—Evidence Disproving Recital in Certificate—Finding of Fact.**

Evidence considered and held sufficient to justify a finding that one under whom plaintiffs claim was the person to whom the original certificate, under which the land in controversy was located, was issued, notwithstanding the unconditional certificate and the judgment of the county court on the application for administration, recited that the grantee in the original certificate had died prior to the date of the issuance of the unconditional certificate, where the evidence shows that the original grantee did not die until several years afterwards.

**4.—Statutes Construed—Residence—Title—Certificate.**

Article 4150, *Paschal's Digest*, construed, in view of article 4178, as not requiring three years residence in the State after issuance of conditional certificate in order to perfect his title.

**5.—Administration—Land Board—Findings.**

A finding by a land board that at the time of the issuance of an unconditional land certificate the original grantee was dead would not divest him of title to the land where he was in fact still living, nor be conclusive that the original grantee was another person than the one shown to be living when the unconditional certificate was granted.

**6.—Limitation—Adverse Possession—Evidence Insufficient to Support.**

Evidence that one fenced part of the land claimed by him and built a small house thereon, these improvements remaining six or seven years when the fence was taken down and sold, in the absence of evidence showing who occupied the premises during this time or the length of such occupancy or any cultivation or use of the premises by such person or anyone holding under him, was insufficient to support a title of limitation by adverse possession. The record showing that the facts were not fully developed upon the issue of limitation, the cause should be reversed and remanded for a new trial.

Appeal from the District Court of Harris. Tried below before Hon. Chas. E. Ashe.

*Baker, Botts, Baker & Lovett*, for appellants.

*Hutcheson, Campbell & Hutcheson*, for appellee John Warren, Jr.

*Brown, Lane, Garwood & Parker*, for appellees W. L. Gardien et al.

*West & Cochran*, for appellee New York and Texas Land Company, Limited.

PLEASANTS, ASSOCIATE JUSTICE.—This is an action of trespass



to try title brought by the appellants against the appellees to recover the title and possession of a tract of 640 acres of land in Harris County, patented to the heirs of Samuel W. Upshaw. Plaintiffs' petition is in the ordinary form of an action of trespass to try title.

The defendants, the New York and Texas Land Company, Limited, John Warren, Jr., W. L. Gardien and M. F. Gardien, and I. D. Eckhardt and W. R. Eckhardt, filed separate answers claiming respectively different portions of said 640-acre survey. The first named defendant disclaimed as to all of said survey except a tract of 160 acres fully described in its answer. As to this 160 acres said defendant pleaded not guilty, and further pleaded that it was the owner in fee simple of said land and that plaintiffs' claim of title thereto is without foundation and is a cloud upon defendant's title, and prayed for judgment quieting it in the title and possession of said land and for removal of the cloud upon its title caused by plaintiffs' assertion of title.

The defendant John Warren, Jr., disclaimed as to all of said land except a tract of 240 acres described in his answer, as to which he pleaded not guilty and the statutes of three, five and ten years limitation, and the defenses of stale demand and innocent purchaser for value. He also prayed for judgment annulling plaintiffs' claim of title to said 240 acres and quieting him in the title and possession of same.

The defendants M. F. Gardien, W. L. Gardien, I. D. Eckhardt and W. R. Eckhardt disclaimed as to all of said land except a tract of 240 acres described in their answer. As to this 240 acres they set up the same defenses pleaded by their codefendant Warren, and in addition thereto pleaded the four years statute of limitation. They also prayed for judgment annulling plaintiffs' claim of title to said land and quieting them in their title and possession of same.

The case was tried in the court below without a jury and resulted in a judgment in favor of defendants in accordance with the prayers of their respective answers.

The record discloses the following facts: Plaintiffs are the heirs of Samuel W. Upshaw, who was born in Virginia in 1805 and came to Texas in 1836, and on October 1st of that year enlisted in the Texas army. He was honorably discharged from the army on December 19, 1837. There is evidence showing that he was in Brazoria County, Texas, in 1837, and in Harris County in 1838. The original conditional certificate by virtue of which the land was located was issued by the Board of Land Commissioners for Harrisburg County, at Houston, Texas, on July 6, 1838. Omitting the caption this certificate is in the following language:

"This is to certify that Samuel W. Upshaw has appeared before us, the Board of Land Commissioners, for the county aforesaid, and proved according to law that he arrived in this Republic subsequent to the declaration of independence and previous to the 1st of October, 1837, and that he is a single man, and is entitled to 640 acres of land to be sur-



veyed after the first day of August, 1838." Dated at Houston the 6th day of July, 1838.

The original field notes of the land in controversy show that it was located by virtue of this certificate on November 23, 1838. The evidence further shows that plaintiffs' ancestor was married in the State of Kentucky on December 25, 1839, and that he remained in said State for about five years and then moved to the State of Mississippi and died there in 1864. It is not shown when he left Texas, but from the evidence as to the length of time it would take to make the trip from Texas to Kentucky he must have left Texas not later than November 1, 1839. He never returned to this State after his marriage. He always claimed that he owned lands in Texas, and frequently spoke of the matter to his family. While living in Kentucky he gave his land papers to a young lawyer who left that State to come to Houston, Texas, and who promised to look after his lands and pay the taxes thereon for him. Nothing was ever heard of the lawyer after he left Kentucky and the papers were never returned to Upshaw.

On January 12, 1852, John H. Woodward filed a petition in the probate court of Harris County for appointment as administrator of the estate of Samuel W. Upshaw. This petition recites that said Upshaw, a citizen of Harris County, died in said county several years prior to the filing of the petition. The petition was granted at the January term, 1852, of said court and Woodward was appointed administrator. On January 27, 1852, Woodward filed an inventory of the estate showing that he held as such administrator an unconditional certificate for 640 acres of land issued in confirmation of the conditional certificate issued on the 6th of July, 1838, by virtue of which the land in controversy was located. On the same day he applied for an order of sale of said certificate. The petition for an order of sale recited that the property of the estate consists of only the certificate for 640 acres of land and that it is necessary to sell same in order to pay the debts of the estate. The only debts mentioned in the petition are \$5 paid for procuring the certificate and \$35 estimated cost of the administration. At the same term of court the application for sale of the certificate was granted. Acting under this order the administrator sold the certificate on March 2, 1852, to W. R. Baker for \$30. This sale was reported by the administrator and confirmed by the court at the March term, 1852, and acting under said order of confirmation the administrator on April 10, 1852, executed a deed to Baker for said certificate and the land located thereunder. The defendants by mesne conveyances, all of which have been duly recorded, claim title under Baker, and they and those through whom they claim have asserted title and ownership to the land in controversy and paid the taxes thereon since the purchase of said certificate by Baker.

Except as indicated in the statement before made of the claim of plaintiffs' ancestor of ownership of lands in Texas and his attempt to



have the taxes thereon paid by the lawyer who left Kentucky for Texas many years ago, there is no evidence that either plaintiffs or their ancestor ever asserted any claim to the land in controversy until shortly before the filing of this suit in June, 1901.

The unconditional certificate by virtue of which the land was patented is in the following language:

"State of Texas, Harris County. No. 1172. 2d Class, 640 Acres. The undersigned Board of Land Commissioners of Harris County, do hereby certify that proof has been made before us that Sam'l W. Upshaw emigrated to Texas previous to the first of October, 1837, and died therein; that he has complied with the law; and that he received a conditional headright certificate from the Board of Land Commissioners of Harrisburg County for 640 acres, dated June 6, 1838, Class 2. That said Sam'l W. Upshaw by Admr. is therefore entitled to an unconditional headright of six hundred and forty acres by virtue of his emigration, and the above described conditional certificate. Given under our hands, at the city of Houston, this 19th day of Jany., 1852.

"HARVEY H. ALLEN,

"Chief Justice.

"JOHN VIREN,

"D. W. CHESTER HARRIS,

"Commissioners.

[Seal]

"Attest: W. R. Baker, Clerk."

The record book of the Board of Land Commissioners for Harris County contains the following entry of date January 19, 1852:

"1172. Samuel W. Upshaw, conditional certificate. Harris County. 640 acres, second class, dated June 6, 1838, arrived before October 1, 1837, and died. Witness: John W. White, Chas. Bowyer."

Two witnesses testified for the defendants that they were acquainted with John W. White, whose name appears upon the record of the Board of Land Commissioners as one of the witnesses who established the facts authorizing the issuance of the unconditional certificate, and that his character and reputation were good.

The patent to the land was issued October 22, 1860. The grant is made to "The Heirs of Samuel W. Upshaw, deceased, their heirs or assigns," and the grantees are designated in the habendum clause by the same language.

The only evidence tending to show that there was any person by the name of Samuel W. Upshaw other than plaintiffs' ancestor who was in Texas at or about the time the original certificate was issued, is the recital in the unconditional certificate and the application for administration that the grantee in the original certificate had died prior to 1852.

The trial judge found as a conclusion of fact that plaintiff's ancestor was the person to whom the original certificate for the 640 acres



of land in controversy was issued, but held as a conclusion of law that the judgment of the land board of Harris County, evidenced by the recital in the unconditional certificate that the grantee in the original certificate was dead and that his administrator was entitled to the unconditional certificate, was conclusive against plaintiffs' right to recover the land as heirs of the original grantee, who the evidence shows did not die until twelve years after the unconditional certificate was issued.

Appellants' first assignment of error assails the judgment upon the ground that the court having found as a fact that the original certificate was issued to the Samuel W. Upshaw, who was plaintiffs' ancestor, and there being no evidence that said certificate or the land located thereunder had been sold by said Upshaw or by plaintiffs, judgment should have been rendered for plaintiffs.

We think the assignment should be sustained. At the request of appellants the trial court filed his conclusions of law and fact, his first finding of fact being as follows:

"The plaintiffs are the sole heirs at law of one Samuel W. Upshaw, who was born in Virginia on October 19, 1805, and who came to Texas during the year 1836. Prior to December 25, 1839, said Samuel W. Upshaw returned to Kentucky, and on that date, to wit, December 25, 1839, married. He thence removed to Mississippi, where he died on April 30, 1864, never having returned to Texas. I also find that this Samuel W. Upshaw was the same person to whom the original conditional certificate dated July 6, 1838, was issued, granting the 640 acres of land in controversy."

Appellees did not except to this finding, and we understand the rule to be that having failed to except to the conclusions of fact filed by the court below they can not by cross-assignment in this court raise the question of the sufficiency of the evidence to sustain said finding. They are in the same position as an appellant who, having failed to raise a fact issue by motion in the lower court for a new trial, seeks to raise such issue by an assignment of error in the appellate court. The findings of fact by a trial court in a case tried without a jury are to be governed by the rules applicable to the findings of a jury upon special issues, and if not excepted to in the lower court can not be assailed upon appeal. Rev. Stats., art. 1333; *Drake v. Davidson*, 28 Texas Civ. App., 184, 66 S. W. Rep., 889. If, however, the question was presented in such manner as to authorize our consideration we would not hold that the evidence was insufficient to sustain the finding. The evidence shows beyond question that appellants' ancestor came to Texas in 1836 and was here in 1838, when the original certificate was issued. As an unmarried white person who emigrated to this State after the declaration of independence and previous to the 1st of October, 1837, he was entitled to a certificate for 640 acres of land. The unconditional certificate which was offered in evidence by plaintiffs, with the reservation that they were not offer-



ing the recital therein that Samuel W. Upshaw had died previous to the issuance of said certificate, contained the further recital that said Upshaw had complied with the law and was entitled to an unconditional certificate for 640 acres of land by virtue of the conditional certificate issued July 6, 1838. There is no recital as to when Upshaw died, and the recital that he had complied with the law and was entitled to the unconditional certificate must be taken to mean that he had resided in the Republic for three years and performed all the duties required of him as a citizen. The evidence as to the length of time plaintiffs' ancestor remained in Texas is not at variance with this recital. He came to Texas prior to the 1st of October, 1836, on which date he enlisted in the army. The evidence shows that he was here during the years 1837 and 1838, and his arrival in Kentucky, to which State he removed after leaving Texas, is not shown to have been earlier than December 25, 1839. It was shown by the evidence that it would at that time have taken not more than six weeks or two months to make the trip from Texas to Kentucky. We think upon these facts, and the further fact that plaintiffs' ancestor always claimed to have acquired land in Texas during his residence there, the trial court was justified in finding that he was the person to whom the original certificate under which the land in controversy was located was issued, notwithstanding the recital in the unconditional certificate and the judgment of the county court on the application for administration, that the grantee in the original certificate had died prior to 1852, and the evidence which shows that plaintiffs' ancestor did not die until 1864. While the language of the statute under which the original certificate was issued is susceptible of the construction contended for by appellees, that in order to perfect his right to the land the immigrant must have resided in Texas for three years after the issuance of the conditional certificate, that such was not the intention of the Legislature in its enactment is shown by a succeeding article of the statute, which provides that the grantee of the conditional certificate when he makes application for the issuance of an unconditional certificate shall only be required to prove that he had been "an actual citizen of the Republic for a term of three years," and has performed the duties required of him as such citizen. Pasch. Dig., arts. 4150, 4178.

We can not accept as sound the proposition advanced by counsel for appellees, and made the basis of the judgment of the lower court, that the finding of the land board of Harris County that the grantee in the original certificate had died prior to the issuance of the unconditional certificate in 1852 is conclusive and can not be questioned in this suit. The case of *Davis v. Bargas*, 88 Texas, 662, cited by appellees in support of the foregoing proposition, only goes to the extent of holding that a board of land commissioners organized and acting under the statute under which the board that issued the unconditional certificate in this case was acting had the power to inquire into the ques-



tion of the assignment of a conditional certificate and to issue the unconditional certificate to the assignee, and that the finding of the board evidenced by the recitals in the unconditional certificate issued by it that such transfer of the conditional certificate had been made was evidence of the fact so recited.

We do not understand this decision to hold that the finding of the land board that the original certificate had been transferred was conclusive, but that it was only *prima facie* evidence of such transfer. Unless the original grantee, or if he was dead at the time the unconditional certificate was issued to the assignee, his heirs or legal representatives was before the board and an opportunity to be heard, the judgment of the board that the original certificate had been transferred could not be conclusive, because no person can be deprived of his property by proceedings to which he is not a party and of which he has no notice, actual or constructive. This is a fundamental rule of our jurisprudence and its disregard would be a clear violation of our Constitutions, both State and Federal. The judgment of our courts, which are organized for the purpose of determining the rights of parties and are supplied with the means of bringing the parties to a controversy before them, when the subject matter of the suit is within the jurisdiction of the court, are conclusive upon collateral attack, the presumption being that the court rendering such judgment had jurisdiction over the parties whose rights it adjudicated, but no such presumption can obtain in reference to the decision of a tribunal the proceedings of which were ordinarily if not invariably *ex parte*, and which was not provided by law with the means of bringing parties or witnesses before it. *Snider v. Methvin*, 60 Texas, 487; *Palmer v. Curtner*, 55 Texas, 65.

The cases of *Dick v. Malone*, 24 Texas Civ. App., 97, 58 S. W. Rep., 168; *Smith v. Walton*, 82 Texas, 547, and *Clifton v. Hewitt*, 56 S. W. Rep., 132, decide a different question from the one raised in the present case. In each of the cases cited the tribunal or official to whom the State had delegated the power to determine who was entitled to receive its bounty issued original certificates to the person adjudged by said tribunal or official to be entitled thereto, and such adjudication was held to be conclusive as against the claim of the heirs of a person other than the original grantee that their ancestor was entitled to the bounty. In none of these cases were vested property rights disturbed by the adjudication held to be conclusive.

In the instant case, as we have before shown, the finding of the land board that the original grantee was dead at the time the unconditional certificate was issued and that his administrator was entitled to the certificate, is not a finding that plaintiffs' ancestor was not the person who was entitled to receive the State's bounty. If, as found by the trial court, the original certificate was in fact issued to the ancestor of plaintiffs, the finding by the land board that he was dead at the time the unconditional certificate was issued would no more



divest him of his title to the land than would the finding of that fact by the county court and the appointment of an administrator of his estate. It seems to be settled that an administration upon the estate of living persons is void. *Withers v. Patterson*, 27 Texas, 497; *Martin v. Robinson*, 67 Texas, 374; *Caplen v. Compton*, 5 Texas Civ. App., 414; *Scott v. McNeal*, 154 U. S., 34.

We can conceive of no ground upon which the adjudication of the death of the grantee of a conditional certificate made by a board of land commissioners in passing upon the application of the administrator of the estate of such grantee for the issuance of an unconditional certificate can be held to be conclusive when such effect is denied a like judgment of the court which appointed such administrator.

Having shown that their ancestor, Samuel W. Upshaw, was the owner of the original certificate under which the land in controversy was located, and the recital in the unconditional certificate, and the issuance of a patent thereon, being sufficient to establish the fact that the original certificate had been approved as genuine by the board appointed for that purpose, and that said Upshaw had complied with the requirements of the law necessary to perfect his right to the land, appellants showed sufficient title to authorize the maintenance of this suit and the recovery of the land. *Kimbrow v. Hamilton*, 28 Texas, 565; *Merrill v. Roberts*, 64 Texas, 441; *Duren v. Railway Co.*, 86 Texas, 291.

It is unnecessary for us to decide whether the patent was void because issued to the heirs of a living person, appellants' right to a recovery not being dependent upon the validity of the patent.

The trial court further found that the defendant John Warren had held adverse possession of the land claimed by him for more than five years before the filing of this suit, and had otherwise complied with the statute so as to perfect title in him to said land under the five years statute of limitation. The evidence shows that Warren fenced about thirty acres of the land and built a small house thereon in the winter of 1894. These improvements remained on the land for six or seven years. In 1901 the fence was taken down and the wire sold by Warren. It is not shown who occupied the premises during the time the improvements remained thereon, nor the length of time such occupancy continued, nor is there any evidence showing the cultivation or use of the premises for any purpose by Warren or anyone holding under him.

We do not think the evidence was sufficient to show such adverse possession, use and enjoyment of the property by the defendant as would have given title by limitation. *Pendleton v. Snyder*, 5 Texas Civ. App., 427.

The record shows that the facts were not fully developed upon the issue of limitation raised by the defendant Warren, and upon another trial it can be certainly ascertained whether or not there was such use and occupancy of the premises by him as would entitle him to



hold the land under his plea of limitation. Such being the state of the record, we do not think in view of all the circumstances that judgment should be here rendered against him. Our conclusion is that the judgment of the court below should be reversed and judgment here rendered for appellant for all of the land in controversy except the 240 acres claimed by defendant Warren, and that as to said defendant the cause should be remanded for a new trial on the issue of limitation, and it is accordingly so ordered.

*Reversed and rendered in part; remanded in part.*

Writ of error refused.



## C. C. KING ET AL. V. CISCO COMPRESS COMPANY ET AL.

Decided April 30, 1904.

**1.—Contract—Construction—Condition in Note.**

A note for \$1000 stipulated that it was not to be payable in the event that a cotton compress "is erected or in course of erection and operated at A. at any time before the maturity of this note." The contract by virtue of which the note was given provided for the payment, by the makers of the note, of \$1000 each year thereafter (the note in suit being for one of the payments) for three years, "or so long as no compress is erected and operated at A., but in the event a compress is erected and operated at A. before the maturity of the note for that year," then liability on the note and contract should cease. The court instructed that the legal effect of the note and contract was that plaintiffs were entitled to recover unless there was a compress in course of erection, or erected, at A. on or before the maturity of the note. Held erroneous, and that the instruction should have been that to constitute a defense a compress must either have been erected or in process of erection, and operated at A. prior to the maturity of the note.

## ON REHEARING.

**2.—Same—Charge—Harmless Error.**

Error in the charge in construing the condition of the contract in reference to the erection of a compress at A. was harmless where the evidence showed indisputably that no compress was erected or in process of erection at A. at the time of the maturity of the note sued on.

**3.—Notice to Produce—Secondary Evidence.**

A letter press copy of a letter addressed to and presumably in the possession of the opposite party is not admissible in evidence where no notice to produce the original has been given.

**4.—Same—Original Out of the Jurisdiction.**

The rule admitting secondary evidence of an instrument without notice to produce where the original is out of the jurisdiction of the court does not apply where the original is in the possession of a party to the suit.

Appeal from the District Court of Eastland. Tried below before Hon. J. H. Calhoun.

*J. J. Butts*, for appellants.

*E. R. Bryan* and *Scott & Brelsford*, for appellees.

SPEER, ASSOCIATE JUSTICE.—This was an action for debt brought by appellants in the District Court of Eastland County, against the appellee on the following note and contract:

"\$1000.00.

Cisco, Texas, April 21, 1900 (1).

On or before May 21, 1901, after date, the Cisco (2) Compress Company promise to pay to C. C. King, J. J. Lowrey and A. S. (3) Johnson the sum of one thousand dollars, at the Merchants and Farmers Bank (4) in Cisco, Texas, with 8 per cent interest per annum from date until paid. (5) The consideration for which this note is given, is that the said C. (6) C. King, J. J. Lowrey and A. S. Johnson, who now own and operate a cotton com(7)press in the town of Abilene, in Taylor County, Texas, will remove said (8) cotton compress from said



town of Abilene, Texas, and out of the territory (9) tributary to said town of Abilene before the beginning of the cotton sea(10)son in 1900, and that no cotton compress will be erected and operated in (11) said town of Abilene, Texas, prior to, or during, the year this note (12) falls due; and in the event the said C. C. King, J. J. Lowrey and A. S. (13) Johnson fail to remove said compress as above stated, or in the event a (14) compress is erected or in course of erection and operated in the said town of Abilene, (15) Texas, at any time before, *or during the year 1901*, [words in italics erased] the maturity of this note, then and in that (16) event this note becomes void, and the liability of the makers hereof (17) shall immediately cease (18).

"In the event the said C. C. King, J. J. Lowrey and A. S. Johnson (19) shall remove said cotton compress as above stipulated, and no other com(20)press is operated in the said town of Abilene, prior to or during the (21) year when this note becomes due, and default is made in the payment of this (22) note and it is placed in the hands of an attorney for collection, or suit (23) is brought on the same, then an additional amount of 10 per cent on the principal (24) and interest of this note shall be added to the same as attorneys fees (25).

(20c. Inter. Rev. Stamp.)

"CISCO COMPRESS CO.

"N. B. BROWN, Prest.

"H. G. FOSTER, Gen. Man."

"State of Texas, County of Eastland. This agreement entered into on this the 21st day (1) of April, A. D. 1900, by and between C. C. King, (2) J. J. Lowrey, and A. S. Johnson, parties of the first part, and the Cisco (3) Compress Company, party of the second part, witnesseth; that, whereas, (4) the said parties of the first part now own and operate a cotton compress (5) located at Abilene, in Taylor County, Texas, and the said party of the (6) second part owns and operates a cotton compress at Cisco, in Eastland (7) County, Texas; and, whereas, the party of the second part is desirous of (8) having the said cotton compress operated by said parties of the first (9) part removed from the said town of Abilene, and out of the territory (10) tributary to Abilene (11).

"Now, therefore, we, the said party of the first part, in consid(12)-eration of the faithful performance by the said party of the second part (13) of the covenants and agreements hereinafter mentioned to be performed by (14) it, do hereby agree to remove the cotton compress now owned and operated (15) by us, located at Abilene, Texas, from the said town of Abilene, in Taylor (16) County, Texas, and from the territory tributary to said town of Abilene, (17) Texas, before the beginning of the next cotton season of 1900, and to (18) not erect nor operate a cotton compress at Abilene, or in said territory, (19) within the next three years from this date (20).

"And the said party of the second part hereby agrees, in consideration (21) of the faithful performance by the said parties of the first



part of the (22) covenants and agreements hereinbefore mentioned to be performed by them (23) to pay to the said parties of the first part the sum of one thousand (24) dollars when said compress and machinery shall have been loaded on the (25) cars at Abilene, Texas, ready for removal, and the sum of one thousand (26) dollars each year thereafter from *the date of such removal* [words in italics erased], May 21, 1900, for three years, or so long as (27) no compress is erected and operated at Abilene, Texas, but in the event (28) a compress is erected and operated at Abilene, Texas, before the *expira*(29)*tion of three years* [words in italics erased], maturity of the note for that year, then and in that event the liability of the party of (30) the second part to pay one thousand dollars contracted to be paid for the year in which (31) such compress is erected and operated, and all subsequent years shall im(32)mediately cease (33).

"Witness our hands this — day of April, 1900.

"CISCO COMPRESS Co.

"By H. G. FOSTER, Gen. Man.

"N. B. BROWN, Pres.

"J. J. LOWREY,

"A. S. JOHNSON,

"C. C. KING."

We sustain appellants' assignment complaining of the construction placed by the trial court in his charge upon the above instruments. The charge is as follows: "The legal effect of the notes and contract sued on in this case and introduced in evidence in connection with the above agreement, is that the plaintiffs are entitled to recover of and from the defendants the amount of said note with interest and attorneys fees to wit, \$1000, with 8 per cent interest on said sum from and after April 21, 1900, and an additional sum equal to 10 per cent of the amount of principal and interest found to be due on said note, unless there was a cotton compress in course of erection, or erected, in Abilene, on or before the 21st day of May, 1901. And if you find that no compress was erected, or in course of erection, on the 21st day of May, 1901, then you will return a verdict in favor of plaintiffs against the defendants, H. G. Foster and N. B. Brown, for the amount of said note with interest and attorneys fees as above set out, unless you find against the plaintiffs on the issue of failure of consideration, mutual mistake or material alteration of the note and contract, as hereinafter set out in this charge."

To our minds the instruments sued upon call for a different construction than that given by the court. We think the court should have instructed the jury that to constitute a defense to plaintiffs' suit, a compress must either have been erected or in process of erection, and operated in the town of Abilene prior to the maturity of the note sued on. This intention is made clear by the language of the contract, which is more specific than that of the note upon this point. In the contract



it is said, "but in the event a compress is erected and operated at Abilene, Texas, before the maturity of the note for that year, then and in that event the liability," etc., shall immediately cease. The same thought is repeated in another place. Even in the note, the only place in which the language "or in course of erection," is used, is in immediate connection with the expression "and operated," confirming, as we take it, rather than contradicting the construction we have here announced. It is not unreasonable that the parties may have contemplated that a cotton compress might be operated in the town of Abilene while in course of erection and before its final completion.

We are of opinion that upon another trial, if the evidence is the same as here presented, the court should not submit the issue of mutual mistake, since there is no evidence tending to raise such issue. The real issue seems to be that of material alteration of the instruments sued upon.

For the error discussed the judgment is reversed and the cause remanded.

*Reversed and remanded.*

#### ON MOTION FOR REHEARING.

A careful scrutiny of the testimony contained in the record convinces us that the particular error of the court, for which we reversed this case upon the original hearing, is harmless. That is, the erroneous construction placed by the court upon the note and contract to the effect that there must have been erected, or in course of erection, at Abilene, a cotton compress prior to the 21st day of May, 1901, to constitute a defense, could not have prejudiced appellants, since indisputably there was no cotton compress in process of erection at that time; and hence the jury could not have relieved the makers of the note on that score.

But the re-examination also convinces us that the error of the court in admitting in evidence the letter press copy of the letter of March 3, 1900, written by appellee Foster to appellant Lowry, was not harmless, as we had originally thought. The real issue raised by both the pleadings and the evidence was that of alteration of the instruments sued on. In this connection it was of course permissible, and necessary to the maintenance of appellees' theory, for them to show that the real contract was different from that expressed by the terms of the alleged altered instruments. Otherwise there could have been no material alteration. The real contract as evidenced by the instruments as originally written, according to the appellees' contention, was that, in the event a compress was erected and operated in the city of Abilene at any time during the year in which the note for that year fell due, then such note, together with all other notes subsequently maturing, were to become void. As tending to support this contention appellees offered in evidence a letter press copy of the following letter:



"CISCO, Texas, March 3, 1900.

"J. J. Lowrey, Esq., Monroe, La.:

"Dear Sir.—I am in receipt of your letter of recent date, and having heard from Mr Brown, I am prepared to make you the following proposition: We will pay one thousand dollars cash and execute our three notes for the sum of one thousand dollars each, first note to be paid in one year provided no compress is located at Abilene at the time of its maturity, the remaining notes to be paid in one and two years, subject to the same condition. To more fully explain, we are willing to give one thousand dollars cash, and one thousand dollars each year so long as there is no compress at Abilene, until three years shall have expired.

"Awaiting your advice, we remain, yours very truly,

"H. G. FOSTER."

This was duly objected to as being secondary evidence, because no notice to produce the original had been given to appellants, and no proper predicate laid for the introduction of such copy. This objection, upon elementary principles, should have been sustained. *Thomson-Houston Electric Co. v. Berg*, 10 Texas Civ. App., 200, 30 S. W. Rep., 457; *Texas Mining and I. Co. v. Arkell*, 29 S. W. Rep., 816; *Missouri Pac. Ry. Co. v. Johnson*, 72 Texas, 100; *Hunter, Evans & Co. v. Lanius*, 87 Texas, 683, 18 S. W. Rep., 204. It does not appear, except perhaps inferentially, that the original letter was beyond the jurisdiction of the court, as suggested by appellee; but if it did, the person to whom it was addressed, and presumably in whose possession it was at the time of the trial, was himself a party to the suit, and hence the reason for the exception to the exclusionary rule, which exception allows the introduction of secondary evidence under such circumstances, is wanting, and such exception should not here be allowed. The possessor of such original being a party to the suit, the court had the power to require the production of such letter, or in case of a disobedience of notice to produce, to allow secondary evidence. Ordinarily, of course, where the original is beyond the jurisdiction of the court, such power is wanting. The court can not direct a stranger to the proceeding to surrender possession of an instrument, and hence the copy is then the best evidence obtainable.

It is contended by appellee, and with this contention we at first were inclined to agree, that this error was harmless, inasmuch as appellants themselves had offered in evidence the following letter, written by appellee Foster:

"CISCO, Texas, March 25, 1900.

"J. J. Lowrey, Esq., Monroe, La.:

"Dear Sir.—Yours under date of March 23 received, containing acceptance of our proposition of March 3, 1900. Proposition as follows: That the Cisco Compress Company promises to pay the Abilene Compress Company one thousand dollars cash when the press is loaded on



the cars, and execute three notes for one thousand dollars each, to mature one, two and three years after date, and bear 8 per cent interest; total amount of this consideration is \$4000, as stated above; these notes to contain a proviso that if there should be another press erected at Abilene, then all notes not matured to be void and not collectible.

"I believe that is in accordance with your letter, and will leave the date and place to transfer the papers to you to determine, just so you don't ask us to go beyond Dallas, but would ask that you meet us here if possible and give me time to get Mr. Brown, as I would like to have him here at that time. Respectfully yours,

"H. G. FOSTER."

But an examination of the two letters discloses the fact that they are capable of constructions entirely dissimilar. Each tends to support the theory of the party offering it, and hence the error is material and should work a reversal of the case.

For this error, rather than the one originally pointed out, the judgment is reversed and the cause remanded.

The motion is overruled.

*Overruled.*



PECOS & NORTHERN TEXAS RAILWAY COMPANY V.  
LOVELADY & PYRON.

Decided April 30, 1904.

**1.—Evidence—Admission by Agent—Damage to Cattle in Shipment.**

Plaintiffs sued three railroads, connecting lines, for damages occurring to cattle in a through shipment, and a settlement having been made with two of the roads, the case was dismissed as to them. On the trial defendant offered in evidence a sworn claim for damages made out against all the roads by plaintiffs' agent who accompanied the cattle. The claim was itemized and accompanied by a statement of the delays, etc., that occurred, and showed that the damages occurred principally on the other lines and did not include items claimed against defendant in the suit. Held that the claim and statement, being in the nature of an admission, was improperly excluded from the evidence.

**2.—Charge—Proximate Result.**

Where the court charged that plaintiffs could recover "for injuries and delays, if any, approximately resulting from the acts of the defendants," etc., the use of "approximately" instead of "proximately" was error which possibly might, of itself, have necessitated a reversal.

Appeal from the District Court of Randall. Tried below before Hon. Ira Webster.

*J. W. Terry and Browning, Madden & Trulove*, for appellant.

*Buie & Rollins and Matlock, Miller & Dycus*, for appellees.

SPEER, ASSOCIATE JUSTICE.—On about October 30, 1899, appellees shipped 472 head of cattle from Canyon City to National Stock Yards, East St. Louis, over the line of the Pecos & Northern Texas Railway Company from Canyon City to Amarillo, thence over the line of the Southern Kansas Railway Company of Texas from Amarillo to Higgins, from which point they were further conveyed over the line of the Atchison, Topeka & Santa Fe Railway Company to market. On about November 6th, following, they shipped 134 head over the same route to Kansas City, Mo. Suits were filed in the district court against the three railway companies to recover damages for injuries to these cattle. These suits were subsequently compromised as to the last two companies named, and the suits dismissed as to them. The present appeal is by the Pecos & Northern Texas Railway Company, the only remaining defendant, the original suits having been consolidated below. The plaintiffs' cause of action against the Pecos & Northern Texas Railway Company consisted in damages to their cattle growing out of the company's failure to furnish cars at the time it had agreed to supply them, resulting in the plaintiffs being forced to expend the sum of \$160 for pasturage for their cattle, as well also as in a loss of flesh and appearance of the cattle while they were thus detained, the alleged damages amounting to \$1972. There was a trial before a jury which resulted in a verdict and judgment for the plaintiffs in the sum of \$1500.

Upon the trial it was made to appear that one Hunter was appellees'



shipper in charge of their cattle being shipped, and that after the shipment and prior to the filing of the suits above referred to, Hunter made an affidavit detailing the injuries to appellees' cattle, which affidavit appellees' attorneys forwarded to this appellant along with appellees' claim for the damages therein stated. The affidavit and claim filed therewith are as follows:

"The Pecos & Northern Texas R. R. Co. and the Atchison, Topeka & Santa Fe R. R. Co. Dr. To Lovelady & Pyron: To 240 head of cattle shipped in name of John Lovelady as hereinafter set out and 232 head shipped in name of R. B. Pyron as set forth hereinafter, shipped from Canyon City, Texas, to East St. Louis, Ill., via Kansas City, viz: Shrinkage 74 lbs. per head, difference in price because of decline in market 15 cents per 100 lbs., and 25 cents per 100 lbs. damaged condition of cattle, thus:

Number cattle, 472; shrinkage, 74 lbs.; at price cattle brought, at \$2.25 per 100 lbs, loss.....	\$1030	37
Number cattle, 472; shrinkage, 74 lbs.; damaged, 25 cents per 100 lbs, loss.....	87	32
Number cattle, 472; shrinkage, 74 lbs.; decline, 15 cents per 100 lbs, loss.....	52	39.2
Number cattle, 472, weighing 751 lbs.; each damaged 25 cents per 100 lbs, loss.....	886	18
Number cattle, 472, weighing 751 lbs.; each decline 15 cents per 100 lbs, loss.....	531	78
Total damage .....	\$2587	97.6

"Canyon, Texas, Nov. 6, 1899.—To John Lovelady, Esq.: Dear Sir: Below will give you a report of the run from this point to St. Louis. I left Canyon City at 6:30 p. m. the 30th of Oct. Arrived at Amarillo at 8 p. m., left about 8:45. Arrived at Washburn 9:50, left 10:30, run out about one mile, engine could not pull the train, so conductor walked back to Washburn, got another engine to pull train back to town (Washburn). So we did not leave there till 1:10 a. m. Oct. 31. Arrived Canadian about 7:30 a. m. One engine No. 195 died on us there, so we did not leave there for about one hour and thirty minutes, say about 9 a. m. Did not arrive at Woodward until about 2:30 p. m., was there nearly one hour, arrived at Wellington 2:30 a. m. the 1st of Nov., was there about one hour, arrived at Florence at 1:00 p. m., left at 2:15 p. m., run out about two miles, the engine broke down, had to get switch engine to pull train back to Florence and get another engine, so left there about 5:30 p. m., arrived Emporia about 8:45 p. m., left about 10 p. m., arrived at Argentine about 5 a. m. and 2nd of Nov., unloaded in the stock yds at 6:30 a. m., being on the cars 60 hours from Canyon City to K. C. without unloading and feeding. After resting until 5 p. m., loaded out over the Wabash for the Nat'l Stock Yds, East St. Louis, Ill., arriving at St. Louis 9 a. m. Nov. 3d., unloaded in the yards



10:45 a. m. On the run from Canyon City to K. C. I ordered the cattle fed and watered at Wellington, Strong City and Emporia, and was refused at each place. On arriving at K. C. Stk Yds the cattle failed and refused to drink by reason of being on the cars so long.

"J. T. HUNTER,

"Shipper in charge.

"Subscribed and sworn to before me by J. T. Hunter, this Nov. 8, 1899.

(Seal)

"B. FRANK BUIE,  
"Notary Public, Randall County, Texas."

"Canyon, Texas, Nov. 10, 1899. Hon. C. S. Sutton, Auditor, Topeka, Kan.: Dear Sir.—Please find inclosed acct. for damages to cattle. We are instructed to ask you to make report on same in 30 days, or bring suit in case of failure. Hoping to hear from you at once, we are, very truly,

"L. G. WILSON AND B. FRANK BUIE,  
Attys. for Lovelady & Pylon."

Appellant offered to introduce this instrument in evidence, but upon objections of appellees that the same was irrelevant, hearsay and an improper way to secure Hunter's testimony, it was excluded. We think appellant's complaint of this ruling necessitates the reversal of this case. An examination of the excluded testimony will disclose that the detailed statement of the injuries to appellees' cattle contains no reference whatever to the items here sued for, but the acts therein complained of appear to be, for the most part, those for which the other lines of road have settled with them in full. We think the testimony was admissible. It is in the nature of an admission against interest by appellees through an authorized agent.

In *St. Louis S. W. Ry. Co. v. Smith*, 33 Texas Civ. App., —, 8 Texas Ct. Rep., 610, where a plaintiff's claim presented to a railway company for an amount less than that sued for was admitted in evidence, the trial court instructed the jury that if they should find from the evidence that the claim put in to the defendant for damages was in the nature of a compromise and settlement, and not as a true and correct amount of the damages sustained, then the plaintiff would not be bound by said claim as the amount of his damages, and that they would not consider it for that purpose. We held this charge to be erroneous, in that it limited the company's right to have the testimony considered as an admission upon the part of the shipper tending to show that his damages were not in fact as great as contended for at the trial. To the like effect is the case of *Gulf C. & S. F. Ry. Co. v. Combes*, 3 Texas Law Journal, 962, 9 Texas Ct. Rep., 743. In that case, discussing evidence similar to that offered here, Chief Justice Fisher used the following language: "We are of the opinion that this latter expression, while proper, limited the effect that the jury could have given to the



statement. They had the right to consider it as original evidence in the nature of admissions made by the plaintiffs tending to show that their damages were not as great as claimed and sued for in the petition, of course subject to any explanation that the plaintiffs could give, such as showing that it was made under a mistake, or that it was merely a proposition submitted in a spirit of compromise." See, also, *Boyer v. Railway Co.*, 8 Texas Ct. Rep., 347. The principle is analogous to that which authorizes the admission in evidence of abandoned pleadings when they contain material admissions against interest; in such latter case it has been held that it is immaterial that such pleadings are not sworn to by the party, or even signed by him. See *Texas & P. Ry. Co. v. Goggin*, 33 Texas Civ. App., —, 8 Texas Ct. Rep., 939, and authorities there cited. Fully as great reason exists for the introduction in evidence of the affidavit under consideration as obtains in the case of abandoned pleadings containing similar admissions. Here the affidavit is shown to have been made by an agent having in charge the transaction of the particular business, and it is used by appellees' attorneys as a basis for their claim for damages against the companies sought to be charged. In this respect it is very similar to a pleading in court by appellee. To be sure, as an admission, even though it were made by appellees themselves, it would not be conclusive, but would be subject to any explanation which they might be able to make. We merely hold that the affidavit should have been admitted in evidence for the consideration of the jury.

We are also inclined to the view that appellant's assignment complaining of the exclusion of the testimony of its agent O. C. Davis should also be sustained. By said witness appellant offered to prove facts which would have tended to show that appellee Lovelady was mistaken as to the date when he says he placed his order for cars. See *Davie v. Terrill*, 63 Texas, 109.

The court in his charge erroneously authorized a recovery for "injuries and delays, if any, approximately resulting from the acts of the defendant alleged in plaintiffs' petition." The use of the word "approximately" rather than the correct term "proximately" is indeed lax terminology, and possibly might itself be sufficient to authorize the reversal of the judgment, but the error will hardly occur again upon another trial. In our opinion none of the other assignments presents error.

For the reasons above given the judgment is reversed and the cause remanded.

*Reversed and remanded.*



## WESTERN UNION TELEGRAPH COMPANY V. H. KAPP.

Decided April 30, 1904.

**Evidence—Copies of Telegram—Original Not Accounted for.**

In an action for damages resulting from a change in the wording of a telegram, made in transmitting it, copies of the telegram furnished by the telegraph agents at the initial and terminal points were offered in evidence by plaintiff. The defendant was not notified to produce the original; neither the sender nor the addressee was called upon to testify, nor were the transmitting and receiving agents of the telegraph company, and no effort was made to account for the nonproduction of the original telegram as delivered. Held, that the admission of the copies in evidence, over objection that a proper predicate had not been laid, was error.

Appeal from the County Court of Jack. Tried below before Hon. R. S. Blair.

*Stanley, Spoons & Thompson*, for appellant.

No briefs for appellee.

CONNER, CHIEF JUSTICE.—This is an appeal from a judgment in appellee's favor for \$64.50, as damages to forty-one head of cattle shipped from Rush Springs, I. T., to Jacksboro, Texas, in October, 1902. As alleged, the ground of appellee's suit, which originated in the justice court, is that in accordance with previous direction one of appellee's employes shipped said cattle, at the same time wiring appellee, care J. W. Knox, Jacksboro, Texas, that he had "shipped one car cattle to day;" that as delivered to Knox the telegram read, "shipped one car cake to day." By reason of which the cattle on arrival were kept in the pens at Jacksboro a day and night without proper attention in the way of feed and water and thereby damaged.

The evidence offered as to the form of the telegrams consisted of copies furnished by the respective agents of appellant at Rush Springs and Jacksboro upon appellee's request therefor. Appellant was not notified to produce the originals. Neither the sender of the telegram nor J. W. Knox, to whom the telegram was delivered, was called upon to testify, nor were the several transmitting and receiving agents, and no effort appears to have been made to account for the nonproduction of the original telegram as delivered. We think it too clear for argument that appellant's objections to the evidence as secondary, and as without a proper predicate for its admission, should have been sustained. The evidence offered was clearly secondary, and to authorize secondary evidence of the contents of the telegram as delivered to the transmitting agent, and as delivered to J. W. Knox, the loss or inability to procure the originals should have been shown.

The particular objection made in the second assignment to the evidence of A. A. Thompson, stating the amount of damages to the cattle per head resulting from standing in the pens at Jacksboro, we think untenable; but in view of another trial we call attention to the cases



of Gulf C. & S. F. Ry. Co. v. Wright, 1 Texas Civ. App., 402; **Fort Worth & D. C. Ry. Co. v. Ward**, 2 Texas Civ. App., 598.

Because of the error of the court in overruling appellant's objections to the copies of the telegram in question, the judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*



## W. H. MAY v. W. M. HOLLINGSWORTH ET AL.

Decided April 30, 1904.

**1.—School Land—Collusion in Purchase—Substituted Purchaser.**

A tract of school land was awarded by the Land Commissioner to N. upon his application to purchase it as an actual settler. N. transferred the land to H., who became an actual settler thereon, and was accepted as substitute purchaser by the Commissioner. Held, that H. was entitled to protection equally as N. would have been against an assault upon the title by a third party, a subsequent applicant, made on the ground that the original purchase was collusive,—a question which, after award of the land, can be raised only by the State. This conclusion would follow, it seems, even though the circumstances attending the transfer from N. to H. had the effect of a forfeiture for nonoccupancy.

**2.—Same—Definition of "Actual Settler."**

A charge defining an actual settler on school land as "one who actually occupies and settles upon the land intending to make it his home," is not subject to serious objection.

Appeal from the District Court of Lubbock. Tried below before Hon. J. M. Morgan.

*C. R. Kinchen and James & Yeiser*, for appellant.

*Beatty & McGee, Kinder & Dalton, and Wm. J. Berne*, for appellees.

STEPHENS, ASSOCIATE JUSTICE.—In response to each of the following special issues the jury returned an affirmative answer, on which and the indisputable facts judgment was rendered denying the recovery sought by appellant of four sections of school land: "First special issue: Was the plaintiff W. H. May an actual settler in good faith on section No. 28 claimed as his home section on December 10, 1901, the date on which his applications to purchase the lands in controversy were filed in the office of the county clerk of Lubbock County? Second special issue: Was the defendant W. A. Nuckles an actual settler in good faith on the land claimed by him as his home section on the 29th day of April, 1899, the date on which his applications to purchase the land in controversy were filed in the General Land Office, and did he at the time in good faith believe that his settlement, if made, was actually made on section No. 28 claimed by him as his home section? Third special issue: Was the defendant W. M. Hollingsworth an actual settler in good faith on the land claimed by him as his home section on the 26th day of November, 1900, the date on which his substitute applications to purchase the lands in controversy were filed in the General Land Office, and did he at the time in good faith believe that his settlement, if made, was actually made on section No. 28 claimed by him as his home section?"

The evidence warranted these findings, and was such on other issues as to warrant us in ascribing to the court a finding of every fact necessary to support the judgment. Owing to the uncertainty then prevailing as to the true boundaries of section 28, Nuckles, to whom the land



was awarded, and Hollingsworth, who took his place both on the land and in the Land Office, seem to have settled on the wrong section.

Few, if any, of the questions of law involved in the appeal, in view of previous decisions in school land cases, remain open to discussion. Unless the circumstances attending the transfer from Nuckles to Hollingsworth had the effect of a forfeiture for nonoccupancy, as provided in the Acts of 1901, page 292, the award to Nuckles in 1899, which took the land off the market, of itself was sufficient to keep it from being subject to appellant's subsequent application, the award having never been canceled. It is contended, however, that the sale to Hollingsworth was pretended and collusive for the sole purpose of having Hollingsworth hold the land for Nuckles, and appellant sought in vain to have this issue submitted to the jury. But since the statute authorized the Commissioner to accept Hollingsworth in lieu of Nuckles as a purchaser from the State, and since he did so accept him, he being, as found by the jury, an actual settler, this substitution gave him all the protection from the assaults of a subsequent applicant, such as appellant, that the award to Nuckles gave him, thus bringing the case within the ruling made in *Logan v. Currie*, 95 Texas, 670, in which it was held that after an award only the State could raise the issue of collusion.

We find no serious objection to the charge defining an actual settler to be "one who actually occupies and settles upon land intending to make it his home." It was certainly less objectionable than any of the definitions offered in the special charges requested by appellant.

The judgment is affirmed.

*Affirmed.*

Writ of error refused.



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## **Administration.**

- See Estates of Decedents; Probate Sale.
- 1. An administrator's account showed a balance in his hands of \$304.51, and stated "there is unpaid audited amounts due to parties who have not applied for their pro rata aggregating \$269.15, leaving a balance to pay costs of final settlement and clerk's costs, etc., \$35.36." In his affidavit thereto the administrator stated that "the within and foregoing is a true and correct exhibit of said estate so far as the same has come to his hand or knowledge." It did not state, other than as above, what the indebtedness of the estate amounted to, nor set out the names and residences of the creditors entitled to the \$269.15, nor ask that the administrator be discharged. It was indorsed on the back "Final account," and notice was given as in case of filing a final account. The order of the court thereon mentioned it as a final account, but merely approved it and ordered it of record, the form of order required by the statute (Rev. Stats., art. 1876) in approving an annual exhibit. No order was made discharging the administrator. Held not a final account such as would be res adjudicata against the claim of the heirs for a restatement of the account made when the administrator asked for an order of final discharge twenty-two years later. Thomas v. Hawpe, 311.
- 2. Even if the account was final so as to bar further inquiry into the matter set out and specified therein, it would not be final as to property accidentally or fraudulently omitted therefrom. Id.
- 3. The action of the administrator in filing a supplemental account twenty-two years later and asking a final discharge recognized the administration as still pending, but, aside from this, the statute provides that "where letters testamentary or of administration shall have once been



**Administration—continued.**

granted, any person interested in the administration may proceed, after any lapse of time, to compel a settlement of the estate when it does not appear from the record that the administration has been closed." Rev. Stats., art. 1882. *Id.*

4. In a contest in the probate court between the heirs and the administrator the approval by that court of the annual exhibits of the administrator showing the collection and disbursement of funds does not have the force of a judgment so as to preclude from contesting the same, and especially is this true when the heirs charge him with fraud. *Id.*

5. While the probate court has the power to adjudge the costs in probate proceedings (Rev. Stats., art. 2251), the district court has not the power, in such a cause brought to it for trial de novo, to adjudge the costs which might further accrue in the appellate courts in anticipation of an appeal from this judgment. *Id.*

6. Where the county probate court, upon reinstating an administration case, adjudged the costs accruing prior to its dismissal against the contestants, such order became final at the end of the term, and, no specific complaint being made of it, was not annulled by an appeal taken by the administrator to the district court. *Id.*

7. Where creditors of an insolvent estate, after notice given by the administrator, have failed to assert their claims for over twenty-five years, it will be conclusively presumed, in a settlement between the heirs and the administrator, that such creditors have abandoned their claims by reason of their laches. *Id.*

8. Where an administrator appears to have applied funds of the estate to his own use, lending them out at good rates, he was properly charged on final settlement with the heirs with interest at the highest legal rate. *Id.*

9. Where the court found that an administrator had wrongfully and knowingly failed to account for certain moneys of the estate, it properly held that he was not entitled to commissions thereon. *Id.*

**Administrator.**

See Administration.

An administrator can delegate to an agent power to do only mechanical or ministerial acts, but in matters of discretion affecting the very existence of the property of an estate the power must be exercised by the administrator. *Rice v. Cornwill*, 341.

**Admissions.**

By prevailing party, newly discovered. See *New Trial*, 1.

As not establishing a constructive trust. See *Limitations*, 5.

See also, *Interrogatories to Party*.

Plaintiffs sued three railroads, connecting lines, for damages occurring to cattle in a through shipment, and a settlement having been made with two of the roads, the case was dismissed as to them. On the trial defendant offered in evidence a sworn claim for damages made out against all the roads by plaintiffs' agent who accompanied the cattle. The claim was itemized and accompanied by a statement of the delays, etc., that occurred, and showed that the damages occurred principally on the other lines and did not include items claimed against defendant in the suit. Held that the claim and statement, being in the nature of an admission, was improperly excluded from the evidence. *Railway v. Lovelady*, 659.

**Adverse Possession.**

See *Limitations*; *Possession*.

**Affidavit.**

In forma pauperis, before court in session. See *Appeal Bond*, 1, 2.

Of physician as to health of witness. See *Continuance*, 2.

Omission of word in. See *School Land*, 6.

**Affirmative Relief.**

In trespass to try title. See *Reconvention*, 1.

**After-Acquired Title.**

Covenants of warranty estopping grantor to set up. See *Mortgage*, 1.



**Agent.**

- Suit by, for commissions on land sale. See Pleading, 3, 4.
- Power can not be delegated to. See Administrator.
- Of railroad, authority in routing shipment. See Carriers of Freight, 4; see also Notice, 1.
- Power of, presumed when. See Practice on Appeal, 5.
- Contract by, subject to approval by principal. See Contract, 7.
- Admissions by, held relevant. See Admissions.
- Holding one out as agent. See Landlord and Tenant.
- Notice to, binding principal. See Notice, 2.
- 1. In absence of an agreement by an agent negotiating a sale of land for the owner to pay for abstracts of title required on such sale, he may recover from the owner, in addition to his commissions, the expense incurred in procuring such abstracts. *Wilson v. Clark*, 92.
- 2. Testimony of plaintiff as to transactions concerning the making of a contract with one whose name he did not know, held admissible, the circumstances showing that such unknown was recognized by defendant as its agent in the matter. *Savings Assn. v. Cornibe*, 385.

**Allegata and Probata.**

- See Evidence, 35.
- 1. Where plaintiff's pleading stated the nature of the injuries to his person, it was not necessary to allege increased susceptibility to colds as resulting therefrom in order to admit evidence of a physician that such result was probable. *Railway v. Crum*, 609.
- 2. Evidence that plaintiff jumped or fell from his engine in escaping from steam from a blown out plug was admissible though the pleading alleged that he was blown from it by the escape of steam, such being proof of the substance of the issue. *Id.*

**Amendment.**

- Allowed under the general rules. See Contested Election, 1.
- Not the method for substituting a lost petition. See Lost Papers.

**Ancient Instrument.**

- Transfer of land certificate. See Evidence, 6.
- As raising presumption of power of attorney. See Power of Attorney, 1.

**Anti-Trust Statute.**

- Of 1895, void. See Contract, 6.

**Apparent Danger.**

- As excusing contributory negligence. See Negligence, 4.

**Appeal**

- See Assignment of Error; Practice on Appeal; Transcript.
- Motion for new trial necessary to. See New Trial, 2.
- Costs of. See Mandamus, 5.
- From dismissal for want of prosecution. See Judgment, 6.
- Proof of inability to give security for the costs of an appeal, when made before the trial court, must be made while the court is in session, and an order or judgment should be entered of record showing that the action taken was the action of the court. Proof before the clerk, with a fiat of approval by the judge indorsed thereon, it not appearing whether this was done in term time or in vacation, is not sufficient. *Rev. Stats.*, art. 1401. *Sidoti v. Railway*, 131.

**Appeal Bond.**

- 1. Where the record shows that appellant's affidavit of inability to give bond on appeal from justice court was contested, no error is shown in dismissing for his failure to give it where the evidence on contest of his affidavit is not preserved in the record. *Cook v. Burson*, 595.
- 2. The fact that the rule made on contest of appellant's affidavit was to give a cost bond merely, and his appeal dismissed on failure to comply, does not authorize the conclusion that the evidence passed on by the court referred merely to his ability to give bond for costs and not for the judgment recovered against him below. *Id.*



**Archives.**

Of General Land Office. See Evidence, 32.

**Argument of Counsel.**

Reading authorities to jury. See Jury. See also, Trespass to Try Title, 3. Improper remarks by counsel to the jury, where withdrawn, held not ground for reversal. *Railway v. Reeves*, 162.

**Assault.**

On passenger. See Carrier of Passengers, 3, 8.

**Assignment.**

To attorney of part of cause of action. See Costs, 1.

Of right to recover penalty. See Usury, 1.

Of debt, by draft. See Unaccepted Draft.

Of deposit. See Bank Draft.

Of lease. See Lease of School Land, 1-3.

1. An assignment, by one claiming to be an attorney for a contractor, of deposit with a surety company given as an indemnity for bonding him, to one to whom such contractor is indebted, held ineffective because the evidence supported a finding that no such power of attorney to assign was given and a finding to that effect would be involved in a general finding against the claim under the assignment. *Lumber Co. v. Surety Co.*, 346.

2. The assignee of an interest in a cause of action against one who subsequently settled with the assignor without the assignee's knowledge, not having filed his assignment with the papers in the suit in accordance with Revised Statutes, article 4647, must show that the defendant had notice of his rights before making settlement, to entitle him to recover of such defendant his interest as assignee in the amount for which the claim was settled. *Railway v. Eldredge*, 467.

3. Articles 308, 309, Revised Statutes, though applying by their terms only to assignment of written instruments, may be looked to in determining the question of burden of proof as to notice of an assignment of a claim not based on a writing. *Id.*

4. The assignee of an interest in the amount to be recovered by suit or settlement on a nonnegotiable cause of action may recover his proportionate interest in the amount paid his assignor in settlement by a defendant who had notice of his interest therein, without establishing the legal liability of such defendant to his assignor. *Id.*

5. The court in which a suit for damages was pending when defendant settled with plaintiff therefor had jurisdiction, on intervention of assignees of an interest in the amount so recovered, to determine the right of such assignees to recover from defendant their proportionate interest in the amount so paid in settlement. *Id.*

**Assignment of Error.**

Separate one required. See Charge, 33.

Held too general to raise the issue presented. See Charge, 34, and also, Telegraphs, 5.

Held futile because accompanying bill of exceptions defective. See Evidence, 5.

1. An objection to a charge that it "is reversible error" is too general a proposition to merit consideration. *Railway v. Gibson*, 66.

2. An assignment of error objecting to evidence will not be sustained where like testimony was admitted without objection. *Railway v. Chapman*, 551.

**Assumed Risk.**

Negligence of another servant. See Negligence, 3.

From defective appliances. See Master and Servant, 4.

As affected by minority and inexperience. See Minor, 1, 2.

Must be pleaded. See Railroads, 25.

Charge placing the burden of proof of assumed risk and contributory negligence upon defendant held erroneous upon the state of facts disclosed by plaintiff's own testimony. *Cement Co. v. Ross*, 597.



**Attorney.**

Compromise by, held without authority. See Will, 1.  
Having part interest in claim sued on. See Costs.  
See also, Power of Attorney, 1-4.

**Attorney and Client.**

Judgment for attorney's part interest in claim of a minor. See Verdict, 3.

**Attorney Fees.**

Allowed to the defendant. See Life Insurance, 6.  
Agreement as to what should be secured by liens held not to include attorney fees, and judgment allowing such corrected. *June & Co. v. Doke*, 240.

**Award.**

Of land lying in two counties. See School Land, 3.

**Bank.**

Not protected as innocent purchaser, when. See Indorser and Indorsee.

**Bank Draft.**

Evidence considered and held to show an assignment of a bank deposit by the execution by the depositor of a draft thereon as payment on an existing indebtedness, as against garnishment served at suit of other creditors of the depositor after the execution of the draft and before presentation and acceptance. *Insurance Co. v. Patterson*, 447.

**Bailee.**

Of bonds, rendering them for taxation. See Foreign Corporation, 3.

**Ballot.**

With names of two candidates, neither erased. See Contested Election, 7.

**Baptismal Records.**

As proof of age. See Evidence, 17.

**Beneficiary.**

Designation of—"home for orphans." See Will, 7; Charitable Devise, 1.  
Must have insurable interest in life of insured. See Life Insurance, 2.

**Bias.**

Of juror. See Condemnation of Land, 2.

**Bill of Exceptions.**

See Evidence, 5.  
Should show what the witness would have answered. See Practice on Appeal, 4.

**Bill of Lading.**

Bills of lading specifying no particular route for a certain shipment of cotton, give the carrier the right to choose the route. *Bessling v. Railway*, 470.

**Bona Fide Purchaser.**

See Innocent Purchaser.

**Bonds.**

See Appeal Bond; City Bonds; Official Bond; City Officer; Taxation, 2.  
Conditional signing of. See Surety.  
City issuing railroad bonus bonds. See City Charter, 1.  
Subject to taxation. See Foreign Corporation, 1.

**Boundary.**

Of the State is political question. See Sovereignty.

**Bribery.**

As vitiating election. See Contested Election, 8.



**Briefs.**

Failure to file in time. See Practice on Appeal, 2.

**Building.**

"Building," as used in a will, held to include the land on which it stood. See Devise.

**Building Association.**

In an action to cancel a Men on the ground of usury in the contract and discharge of the debt by payments, plaintiff could have cancellation of stock certificates, issued to him by the defendant building association as a part of the transaction sought to be set aside, under his prayer for general relief. Savings Assn. v. Cornibe, 385.

**Builder's Contract.**

As a cover for usury. See Usury, 3.

1. A charge to find for defendant on a claim of a building contractor for extra work, because the written contract provided that no such claim should be allowed unless done on written order and estimate of the architect, which were not had, was properly qualified by the further exception of the case of a ratification by the owner of the giving a verbal order therefor by the architect, if there was evidence of such ratification. Cronin v. Still, 293.

2. Charge held erroneous because of absence of evidence of authority of agents making waiver for owner of a building of his claim for damages by delay of contractor in its construction or of the making of a final settlement between the parties, submitted to the jury as constituting defenses. Id.

**Builder's Lien.**

Notice of, to an agent. See Notice, 2.

1. Article 16, section 37, of the State Constitution gives a lien upon buildings and lots upon which they are situated to the builder upon his furnishing the material, and the filing and recording of the building contract is not essential to the validity of the lien as to the parties or those dealing with them with notice; and an express lien by contract has the same effect. June & Co. v. Doke, 240.

2. Description in building contract and notes given for the erection of the buildings held sufficient where those giving the lien had no other property. Id.

3. A "builder's lien," as defined by the Constitution, extends to the lots upon which the buildings are situated as well as the buildings themselves, and the same effect will be given to an express contract for a "builder's lien." Id.

**Burden of Proof.**

Charge on, upheld. See Contributory Negligence, 1; Charge, 27.

Heirs of wife suing for equitable community title. See Heirs, 2.

See also, Assumed Risk, 1; Illicit Relations, 1.

**Cancellation.**

Of stock, in connection with usury. See Building Association.

Of notes for fraud. See Contract, 9.

Of patent to land. See Public Land, 1.

**Carriers of Freight.**

See Bill of Lading; Interstate Commerce; Shipment of Cattle.

1. Railroad companies are not under the absolute duty of unloading a shipper's stock en route for rest, feed and water upon his request, without regard to the reasonableness or necessity of the request. Railway v. Clark, 189.

2. Where cotton was shipped by rail consigned to "shipper's order, Dallas, Texas, notify W. & Co.," the carrier, if it was its duty to notify the shipper that W. & Co. had refused to receive the cotton, would be liable for decline in the market price of the cotton only from the time it was notified by W. & Co. of their refusal to receive the cotton, or by the exercise of ordinary diligence could have known of such refusal. Railway v. Jenkins, 429.

3. The carrier, if liable at all, would be liable only as warehouseman if it exercised reasonable diligence in notifying the shipper of the consignee's failure to receive the cotton. Id.

4. The agent of a railway has authority to bind the company as to the



**Carriers of Freight—continued.**

routing of a through shipment in the absence of knowledge by the shipper of limitation on his powers; but where he notified a shipper demanding an all rail shipment that the company would not regard such billing by him but would send it partly by water, this was notice to the shipper of his lack of authority to contract for an all rail shipment. *Bessling v. Railway*, 47<sup>n</sup>.

5. Where there was no contract by the carrier for all rail transportation and the bill of lading was silent as to the route, the selection of a route partly by water, whereon the goods were lost by act of God, did not make the carrier liable. *Id.*

6. Where, in an action against a carrier for injury to live stock shipped under a contract by the terms of which plaintiff, the shipper, assumed the risk of danger from overloading, the defendant pleaded that the cars were overloaded, no pleading on the part of plaintiff was necessary to rebut that defense and to warrant a charge submitting that issue. *Railway v. White*, 521.

7. Where horses are shipped on a through contract over connecting lines, and suit is brought against the initial line for injury occurring during the shipment, the fact that the contract limits the liability of the defendant to injury occurring on its own line does not make the value of the horses at the last point on defendant's line the measure of damages, but such measure is their value at the point of destination, and it is immaterial whether or not defendant had notice that they were intended for sale at the point of destination. *Id.*

8. Where plaintiff's witness testified as to the value of the horses at their destination, had they arrived in good condition, his testimony was not an opinion and subject to objection on the ground that he did not define what he understood "good condition" to be, since defendant, if he deemed that term not sufficiently explicit, could have, by cross-examination, ascertained what the witness meant thereby. *Id.*

**Carrier of Passengers.**

See Passenger.

1. A charge requiring a railway company to use "proper care" in keeping in repair the appliances for preventing the escape of sparks from its passenger engines does not require too high a degree of care, and the term "proper care" does not require any definition in order to prevent the jury from understanding it as requiring care in too high a degree. *Railway v. Flood*, 197.

2. A requested charge, set out in the opinion, as to negligence on the part of a passenger in sitting by an open car window, held properly refused as on the weight of evidence, and one given held to fairly submit the issue, if it can be said in any case that such an act can constitute contributory negligence. *Id.*

3. Evidence considered and held to warrant a recovery in the sum of \$1000 for an assault by a conductor on a boy who had entered the train with a ticket, but was supposed by the conductor to be stealing a ride. *Railway v. Gaines*, 257.

4. Requested charges as to the degree of care required in keeping a depot platform in safe condition for use of passengers held sufficiently covered by the general charge. It seems that the high degree of care generally required of railroad companies to prevent injuries to their passengers applies as well to keeping their platforms and usual approaches to depots and cars in reasonably safe condition as to other incidents and instrumentalities of transportation. *Railway v. Barrett*, 346.

5. Where the court properly charged with reference to negligence in leaving a skid, over which plaintiff stumbled and fell, lying at night on a depot platform, such charge was not rendered inapplicable by the fact that witness for defendant testified "that the skids and trucks were kept against the wall of the depot," no witness testifying that they were so placed on the night of plaintiff's injury, or that the skid was placed where found by any person for whose act in so doing defendant was not liable. *Id.*

6. Where a railway company makes a contract with a light and power company to supply its cars with gas, and an explosion causing injury to a passenger results from the careless manner in which a servant of the latter company fills the gas tank in a car, the railway company is not excused for its failure to take the proper high degree of care for the safety of its passengers, since its duty to them is to see that the servant of the other company, admitted on its premises to supply its cars with gas, does not do that in such manner as to expose them to danger. *Railway v. Rhodes*, 432.

7. The light and power company having undertaken to discharge for the carrier the duty of supplying the cars with gas, thereby placed itself under



**Carrier of Passengers—continued.**

obligation to the passenger to exercise at least the care of a person of ordinary prudence, and for a breach of this duty it is liable along with the carrier for the consequent injury. *Id.*

8. While plaintiff's wife was traveling in a lighted passenger car at night it stopped at a regular station for a short period, during which time, the employes being temporarily absent from the car, a negro entered the car from the outside and finding plaintiff's wife alone in the car and asleep made an assault on her. Held, that the railway company was not liable therefor, since the assault was, under the circumstances, so unreasonable and out of the ordinary that it could not have been contemplated by a prudent person. *Segal v. Railway*, 517.

**Casualty Insurance.**

Against dangers of a given employment—liability. See *Life Insurance*, 1.

**Cattle Shipment.**

See *Shipment of Cattle*.

Over several lines—damages. See *Admissions*.

**Cause of Action.**

Assignment of—settlement without notice. See *Assignment*, 2.

**Certificate.**

By probate clerk, construed. See *Probate Records*, 1.

**Certified Copy.**

Of records of General Land Office. See *Evidence*, 32.

**Change of Venue.**

Does not affect right to invoke *lis pendens*. See *Lis Pendens*, 2.

**Charge.**

Curing improper admission of evidence. See *Evidence*, 36.

As to engineer's duty to keep lookout, held correct. See *Railroads*, 21.

1. Failure of the trial court to inform the jury what were the issues of fact presented by the pleading may not, ordinarily, require a reversal of the judgment; but where the pleading is so complicated and technical as to render it doubtful whether the jury would clearly understand the issues presented, such failure to so inform the jury is reversible error. *Manufacturing Co. v. Femelat*, 36.

2. A charge that "If you believe from the evidence that the plaintiff was injured at the time and in the manner substantially as charged and alleged in plaintiff's petition, you will find for the plaintiff," is held erroneous as on the weight of evidence, it not being established as a matter of law that the facts alleged in plaintiff's petition as to the manner in which plaintiff was injured constituted negligence on the part of defendant. *Id.*

3. The difference between instructing a verdict for plaintiff if the jury find certain facts from a preponderance of evidence, and for defendant if they find certain facts, if prejudicial to the latter, held cured by a proper charge elsewhere on the defense of contributory negligence. *Railway v. Moody*, 46.

4. Inconsistent paragraphs in a charge are not ground for reversal where the charge, when read as a whole, does not leave the jury in doubt. *Drug Co. v. Durham*, 71.

5. A charge instructing the jury that "deceased in the discharge of his duties had a right to be upon the cars and track of the defendant company \* \* \*" can not be assailed on the ground that the issue of whether deceased was in the discharge of his duties was not presented where the evidence showed that he was an inspector of customs and that he had started across the track to inspect a car of rails which had been loaded for shipment when he was killed by defendant's train. *Railway v. Levy*, 107.

6. It is not error to refuse a requested special charge upon contributory negligence where the same issues have been sufficiently presented in the main charge. *Id.*

7. Evidence considered and held sufficient to justify the submission of the issue of negligence in the duties arising from the discovery of the perilous position of a watchman on a railroad bridge by the engineer of a train, though the engineer denied having discovered it in time,—there being circumstances tending to show the contrary. *Railway v. Brock*, 155.



**Charge—continued.**

8. A charge upon negligence which ignores the defense of assumed risk is not erroneous where it is not shown that there was any testimony raising this issue. *Railway v. Reeves*, 162.
9. The court has authority to modify a charge asked by a party and give it to the jury without rewriting the whole charge. *Railway v. Davis*, 285.
10. There is no error in refusing special requested charges upon issues covered by the general charge. *Id.*
11. Charge upon negligence and proximate cause of injury to plaintiff caused by breaking of a defective truck held correct when read in connection with other paragraphs of the charge. *Id.*
12. Charge held erroneous as assuming the fact that there was real or apparent danger of the injured party being thrown from the wagon in which she was riding at the time she jumped therefrom and received injuries in consequence. *Railway v. Booth*, 322.
13. Charge held erroneous and on the weight of evidence because assuming the fact that plaintiff's deceased son, for causing whose death defendant was sued, was of industry, capacity and disposition to continue to earn money and contribute to the father's support in the future. *Railway v. Phillips*, 337.
14. A charge that if defendant used ordinary care to furnish a safe fastening for a door, which fell and injured plaintiff, or had made such inspection of the fastening as an ordinarily prudent person would have made, to find for defendant, being sufficient to cover the facts of this case it was not error to refuse a charge to find for defendant if the falling of the door was a mere accident. *Railway v. Hutchens*, 343.
15. Plaintiff's petition claimed damages for injuries resulting from a telephone line being permitted to hang too low across a first-class public road he was traveling, and defendant's answer having alleged that there was no public road at the place of the accident, plaintiff replied by supplemental petition that if the road was not a public county road it was one continuously traveled by the public; and the evidence showed that the injury occurred at a point where the road as traveled by the public deviated from its line as established by the commissioners court. Held, that it was error for the charge to ignore the issue thus raised and make plaintiff's right of recovery dependent on the road being a lawfully established first-class public road at the place of the accident, as the deviation of the road at that point was immaterial. *Adams v. Weakley*, 371.
16. A charge which repeatedly submits the issue of contributory negligence is erroneous as giving that matter undue prominence. *Id.*
17. It is error for the court to charge with reference to matters not presented by the pleadings and evidence. *Railway v. Jenkins*, 429.
18. Charge held correct which made defendant liable for injuries to a child scalded by steam and hot water from a stationary engine at defendant's pumping station, if he was on the premises with the knowledge and consent of defendant's servant; facts held to support a recovery for negligence in such case. *Railway v. Bulger*, 478.
19. A charge requiring the jury to find that the evidence establishes the existence of a specific group of facts before they can find for defendant on its plea of contributory negligence approved. *Id.*
20. A charge defining contributory negligence as to a child injured to be a failure on his part to exercise, for his own safety, such a degree of care as would have been reasonably expected of him, instead of such a degree of care as is reasonably to be expected from children of his age, was correct and required by the fact that plaintiff was a dull boy and might not have such discretion as is reasonably to be expected from a child of his age. *Id.*
21. Where the evidence is sufficient to have justified a peremptory instruction the question of error in charges given become immaterial and will not be considered. *Tucker v. Investment Co.*, 474.
22. Where there is no controversy in the evidence as to a given matter, it is not error to refuse a requested charge submitting that matter to the jury as an issue. *Railway v. Pelfrey*, 501.
23. Where the general charge sufficiently presents an issue a special request thereon is properly refused. *Fagan v. Vogt*, 528.
24. The court's general charge on the measure of damages and the refusal of special charges upon that issue, if error at all, were immaterial where the verdict is manifestly based on the issue of liability and the jury did not reach the issue of damages. *Wofford v. Irrigation Co.*, 531.
25. A charge instructing the jury to find for the plaintiff, in an action for damages for injuries sustained in a collision between two street cars, if they believed such collision was the result of the motorman's negligence, held, in view of the testimony, not misleading as to which motorman was meant. *Railway v. Chapman*, 551.



**Charge—continued.**

26. Evidence that a conductor, injured in a street car collision, could not oversee or do the work he usually did and that he was forced to hire a foreman at a salary of \$25 per week to attend to this for him was sufficient proof of loss of time and value thereof to warrant a charge including such items in the measure of damages. *Id.*

27. Charge on burden of proof as given held less objectionable than the requested charge which was refused. *Id.*

28. A paragraph of a charge was not objectionable as ignoring the issue of contributory negligence where another part of the charge submitted that issue. *Shippers Co. v. Davidson*, 558.

29. Charge to find for defendant in absence of proof of the defects in brake of tram car alleged in the petition, should have been given under the state of pleading and evidence in this case. *Cement Co. v. Ross*, 592.

30. Failure to give requested charges is not error when the ground is covered by the court's general charge. *Railway v. Matherly*, 604.

31. It was not error to refuse a requested charge instructing that testimony of statements made by defendant two years before she put plaintiffs in possession of the land in controversy should not be considered for the purpose of proving that she gave the land to plaintiffs but only as showing her intention, since the only issue was whether it was her intention to convey the absolute title or only a life estate when she put them in possession. *Shannon v. Marchbanks*, 615.

32. A requested charge assuming as a fact a certain issue in dispute was properly refused. *Metcalf v. Lowenstein*, 619.

33. A complaint that the court should have submitted an issue suggested in a requested charge, although the charge itself was erroneous, should be made by a separate assignment of error in order to be considered on appeal. *Id.*

34. A charge to find for plaintiff if the jury believed that defendant was under the impression that he was reconveying the property which plaintiff had conveyed to him a short time before, was erroneous in that it ignored the issue raised as to whether defendant was under obligation to reconvey; and defendant can complain of such error under a general assignment alleging error in the charge. *Id.*

35. Where the court charged that plaintiffs could recover "for injuries and delays, if any, approximately resulting from the acts of the defendants," etc., the use of "approximately" instead of "proximately" was error which possibly might, of itself, have necessitated a reversal. *Railway v. Lovelady*, 659.

**Charitable Devise.**

To "an orphans' home"—designation of beneficiary. See *Will*, 7.

Not defeated by executor's failure to establish the home. See *Will*, 6.

A devise of the estate in remainder after the death of devisees for life for the establishment of a widows and orphans' home to be created and incorporated by the trustees for the relief of persons of that class in a certain city, held not void for want of a trustee or beneficiary capable of taking title; the title was in the trustees till the creation of and transfer to the contemplated corporation by them. *Gidley v. Lovenberg*, 203.

**Child.**

Yet unborn, devise to. See *Will*, 8.

Injury to—degree of care and contributory negligence. See *Charge*, 18, 20.

**Citation.**

On cross plea—waiver by answer. See *Reconvention*, 2.

By publication—sufficiency. See *Judgment by Default*, 2, 3.

**City Bonds.**

1. It was not, in 1872, necessary to the validity of bonds, which a city was authorized to issue, to provide at the time for a special tax for their liquidation. The mayor and board of aldermen could levy such a tax but they might do so from time to time as occasion therefor arose. Nor was it essential that they should have set aside a part of the general annual revenue for that purpose, but their having done so did not vitiate the bonds. *Jefferson v. Banking Co.*, 74.

2. Where an innocent purchaser for value bought bonds issued by a city to secure money for the construction of a railroad, the fact that such bonds were without consideration would not be a defense to a suit by a bank, to whom such innocent purchaser had turned the bonds over for collection. *Id.*



**City Charter.**

- Fixing tenure of office for life or good behavior. See *City Officer*, 1.
1. Charter of the city of Jefferson construed as conferring upon the city the power to issue bonds in the furtherance of the construction of railroads to or from the city and to make such bonds negotiable or payable to bearer. *Jefferson v. Banking Co.*, 74.
  2. The amendment to the charter of the city of Dallas authorizing the creation of improvement districts by the city council and the levy of a tax against property owners in such improvement districts to meet expenses of improving streets was constitutional, and a tax was valid which was levied to pay for street paving though the property taxed was used as a home-stead. *Kettle v. Dallas*, 632.

**City Officers.**

1. Sections 26 and 26a of the charter of the city of Houston, placing the employes of the police, fire and health departments under civil service regulation and providing that they can only be discharged upon complaint for cause made to a board established for this purpose, appeal lying to the city council, held unconstitutional in so far as they fix the tenure at life upon good behavior. The constitutional term of two years will govern, subject to such regulation. *Houston v. Estes*, 99.
2. It was not error to overrule a special exception to an allegation that the city marshal, who discharged plaintiff, had suggested his name to the mayor who nominated him for a place on the police force, such an allegation not being subject to the objection that it sought to take away from the mayor his independent power of appointment, the mayor having no such independent power. *Id.*
3. An assignment of error complaining of the court's action in sustaining a special exception addressed to the defense that the city had appointed a successor to plaintiff, a discharged policeman, and plaintiff had not tried to oust him by suit and was therefore estopped to set up his right to the office, is properly overruled, since the office of policeman is not a distinct office, and though new policemen were appointed no particular person took plaintiff's place. *Id.*
4. A city ordinance requiring sureties on bonds of municipal officers to bind themselves to pay all fines assessed against such officers for official misfeasance is merely declaratory of the legal effect of such instruments. Where the bonds comply with the requirements of the city charter, they need not embody the terms prescribed by the ordinance. *Id.*
5. The execution of a proper bond is not a condition precedent to the right to the office; if there is any valid objection to the bond it must be urged and the official given an opportunity to file another curing the defect. *Id.*
6. The fact that plaintiff served ten days as a special policeman by appointment of the mayor held not to be an abandonment of the office of regular policeman. *Id.*

**City Ordinance.**

- Proof of by pamphlet. See *Evidence*, 30.
- Regulating speed-violation as negligence. See *Negligence*, 8, 10; *Evidence*, 29.
- Unreasonableness of, to be pleaded. See *Negligence*, 11.
- As to ringing bell—how much ringing. See *Public Crossing*, 2.

**Common Law.**

- As prevailing in Indian Territory. See *Judicial Notice*.

**Common Law Marriage.**

- See *Illicit Relations*, 2, 3.

**Common Source.**

- In case of suit with a tenant. See *Trespass to Try Title*, 6.

**Community Property.**

- Sale of, by survivor. See *Husband and Wife*, 1.
- Heirs of deceased wife claiming interest. See *Innocent Purchaser*, 2, 3.
- Not acquired during illicit relations. See *Illicit Relations*, 2.

**Compress Company.**

- Obstructing street—liability for personal injury caused. See *Street*, 1, 2.



**Collateral Attack.**

Presumptions of regularity in cases of. See *School Land*, 2.  
 Privy in estate subject to rule of. See *Judgment*, 4.  
 Application of rule. See *Judgment*, 5; *Judgment by Default*, 1.

**Collusion.**

In purchase of school land. See *School Land*, 10.

**Commissions.**

Denied to administrator. See *Administration*, 9.  
 Suit by land agent for. See *Pleadings*, 3, 4.

**Commissioners Court.**

Settlement by, with county clerk, for surplus fees. See *County Clerk*.  
 Mandamus to compel approval of bond by. See *Mandamus*, 1-3.

**Compromise.**

By attorney, held made without authority. See *Will*, 1.

**Conclusions of Law and Fact.**

Should be excepted to. See *Practice on Appeal*, 6.  
 A refusal of the trial court to file conclusions of law and fact is not reversible error where request therefor was not made until the last day of the term, and the court certifies that there was not time to prepare them. *Bailey v. Fly*, 410.

**Concurring Negligence.**

Of foreman and fellow servants. See *Railroads*, 19.

**Condemnation of Land.**

1. Where plaintiff sued a railroad company in trespass to recover certain land and for damages caused by the erection of tracks and embankments thereon, and defendant by cross-plea asked to have the land condemned, which was done, and plaintiff awarded the value thereof, the admission, without sufficient pleading, of evidence of special injury to the land caused by the embankment was immaterial, as particularity of pleading is not required in condemnation proceedings. *Railway v. True*, 309.

2. In a condemnation proceeding wherein the jury awarded plaintiff, the owner of the land, less than one-half its value as testified to by him, and no complaint is made of the amount awarded as being excessive, it was not reversible error that the court, over objection, permitted certain jurors to sit in the case who had a fixed opinion that plaintiff ought to recover, they having further answered that such opinion, in their judgment, would not influence them. *Id.*

3. So, in view of the amount awarded plaintiff for the land, of which no complaint is made as being excessive, it was harmless error that plaintiff was permitted to give in evidence "the value to him" of the land condemned and appropriated. *Id.*

**Connecting Lines.**

Venue in suit against. See *Railroads*, 10.

**Consideration.**

Want of, as defense against innocent purchaser. See *City Bonds*, 2; *Promissory Note*, 3.

**Constitutional Law.**

Tenure of office—two years. See *City Officer*, 1.

Jurisdiction of estates. See *Estates of Decedents*, 1.

As not requiring record of builder's lien. See *Builder's Lien*, 3.

Validity of local option laws. See *Local Option Election*, 2, 4.

City improvement tax on homestead. See *City Charter*, 2.

1. The Act of June 16, 1897, commonly known as the fee bill, in its provision that the fees of the office of county clerk in excess of certain stated amounts shall be paid over to the county treasurer, is not violative of section 48, article 3, of the Constitution declaring that the Legislature shall not have the right to levy taxes or impose burdens upon the people except for purposes therein specified relating to the State government, nor of section 51 of the same article providing that the Legislature shall have no power to make any grant of public money to any individual, association of indi-



**Constitutional Law—continued.**

viduals, municipal or other corporation whatsoever. *Tarrant County v. Butler*, 421.

2. If the statute, in fixing the compensation of the county clerks at an amount of fees not exceeding a stated sum, can be said to place their compensation on a salary basis, contrary to the general scheme of the Constitution that their compensation shall be fixed by fees of office, still it is not in direct conflict with section 20, article 5, of the Constitution, providing that "the duties, perquisites and fees of office of the county clerk shall be prescribed by the Legislature;" and conflicts by mere implication with other provisions not relating to the subject are not to be entertained. *Id.*

3. That some of the populous counties will receive money through the excess of fees paid over to them under the statute is but an incidental and remote result of the law, which is designated to properly equalize the compensation of the county clerks and to prevent some of them from receiving an unduly large compensation. *Id.*

4. The requirement that the excess of fees above a specified sum shall, in certain contingencies, be paid over to the county is not a grant of public money within the meaning of the constitutional provision inhibiting such a grant, for the Constitution can not be held to have had such a fund in view. *Id.*

**Contested Election.**

1. In an election contest the rules governing the amendment of pleadings in civil cases apply. Following ruling of Supreme Court on certified question in this case, as reported in 97 Texas, 425. *Bailey v. Fly*, 410.

2. An action to contest an election may be maintained upon an affidavit of inability to pay costs. Following ruling in 97 Texas, 425. *Id.*

3. Under the statute the court trying a contested election case may order a new election only where the result of the contest as shown by the vote is a tie, and if there be a majority, however scant, the court has no discretion to make such order. *Id.*

4. Threats of a landlord to evict his tenants unless they voted for the candidate he favored do not warrant throwing out the box at that polling place where it is not shown that such threats were addressed to the tenants, nor how they voted, nor that the candidate was privy to such conduct. Evidence held to show that a tenant was not so intimidated or influenced in casting his vote by such threats of eviction as to render the vote illegal. *Id.*

5. While declarations by a voter as to his place of residence, made after the election, are not admissible as original evidence, they may be admissible for purposes of impeachment where the voter had testified, as a witness in the case, that he had claimed the county of the election as his home for six months prior to the election. *Id.*

6. Where no identity of person was shown proof that the vote of Jesus Nieto was illegal did not warrant the exclusion of the vote of Terus Nieto. *Id.*

7. A ballot should not be counted upon which the names of two candidates are printed and neither of the names is erased, although a pencil mark is drawn under one of the names, but not touching it. *Rev. Stats., art. 1741. Id.*

8. In the absence of a showing of connivance or procurement, on the part of a candidate for office, the box at a voting precinct will not be entirely thrown out upon an allegation that a partisan of such candidate influenced a portion of the voters at that point, by bribery or intimidation, where the proof fails to identify a single voter who was influenced or to establish that any were so influenced. *Id.*

9. The rule requiring the elimination of an entire box where practices are resorted to which necessarily or probably influence a large number of voters, and which by reason of its nature and effect is rendered impossible of definite ascertainment, held not applicable to this case. *Id.*

**Contingent Remainder.**

To child unborn. See *Will*, 9.

**Continuance.**

1. Where an application for continuance stated that "to show the materiality of the testimony of the witnesses for which this continuance is sought defendants state that they expect to prove," etc., followed by a statement of facts which on the face of the application seem to have been material, but contained no direct averment that the testimony was material, the application was properly overruled. *Rev. Stats., art. 1278. Patton v. Williams*, 129.



**Continuance—continued.**

2. An application for continuance is defective which fails to state that the applicant "has used due diligence" to procure the absent testimony, although the facts stated may seem to show diligence. *Id.*

3. The trial court properly refused a continuance for the testimony of a party to the suit whose deposition had been taken *ex parte* by her adversaries, but not in her own behalf, where it appeared, upon the affidavit of her family physician, that she was at the time of trial too feeble in health and mind to attend court and would likely continue in that condition. *Shannon v. Marchbanks*, 615.

4. Testimony of a witness who took the deposition of one of the parties to a suit that she asked him how she should answer the interrogatories, which would probably have been excluded if objected to, is not ground, when admitted without objection, for an application for continuance to meet and explain it. *Id.*

**Contract.**

For sale of corn, ambiguous as to weights and grades. See *Sale*, 1.

To furnish motor power. See *Electricity*.

See also, *Building Contract*; *Written Contract*.

1. Where the parties to a stipulation, on the sale of a business, against re-engaging therein within named limits agreed on the liquidated damages to be recovered in case of breach, the purchaser was limited to such remedy and could not have injunction against a breach of the stipulation. *Rucker v. Campbell*, 178.

2. It is not essential to the validity of a contract that the signatures of the parties should be at the foot of the instruments where such contracts are usually signed. *Railway v. Clark*, 189.

3. Written instructions given the agent of a railway by a cotton shipper to send the cotton of such shipper by an all rail route, to which the agent assented but at the same time told the shipper that the railway would disregard such instructions and send the cotton part way by a water route according to their custom, did not constitute a contract binding the company to an all rail shipment, but amounted only to an instruction or direction of the shipper. *Bessling v. Railway*, 470.

4. The validity of a contract whereby defendant company agreed to furnish plaintiff certain ice-making machinery, to be placed on his homestead, a lien on the property to be afterwards given by defendant and wife, could not be assailed by defendant, in an action of damages for its breach, on the ground that the wife had not joined in making the contract, since defendant would be liable on it in damages should the wife refuse, at the proper time, to join in executing the lien. *Wolf & Co. v. Galbraith*, 505.

5. In an action for damages for breach of a contract whereby defendant agreed to sell plaintiff certain machinery, wherein the profits to be derived from the operation of the machinery are shown to have been within the contemplation of the parties, and their loss the direct result of the breach of the contract, a recovery may be had for such lost profits. *Id.*

6. The Texas anti-trust statute of 1895 being itself void, can not be invoked to defeat an action of damages for breach of a contract on the ground that the contract is in violation of such statute. *Id.*

7. Where in an action for breach of a contract to sell certain machinery, executed for the seller by an agent, there was pleading and evidence to the effect that the agent signed the contract upon the understanding that it was to be submitted to and approved by the seller before taking effect, it was error for the court to refuse to submit that issue to the jury. *Id.*

8. The continued use of an article after discovery of its worthlessness, while a waiver of the right to rescind the contract of purchase, does not preclude a recovery of damages for fraudulent misrepresentations in obtaining the contract. *Cash Register Co. v. Berry*, 554.

9. Judgment cancelling notes for the purchase price of a cash register machine and refunding the amount paid on it was supported by the evidence whether the jury found on the ground that the machine was worthless, in which case there would be an entire want of consideration, or that there was fraud in procuring the contract. *Id.*

10. A note for \$1000 stipulated that it was not to be payable in the event that a cotton compress "is erected or in course of erection and operation at A. at any time before the maturity of this note." The contract by virtue of which the note was given provided for the payment, by the makers of the note, of \$1000 each year thereafter (the note in suit being for one of the payments for three years, "or so long as no compress is erected and



**Contract—continued.**

operated at A., but in the event a compress is erected and operated at A. before the maturity of the note for that year," then liability on the note and contract should cease. The court instructed that the legal effect of the note and contract was that plaintiffs were entitled to recover unless there was a compress in course of erection, or erected, at A. on or before the maturity of the note. Held erroneous, and that the instruction should have been that to constitute a defense a compress must either have been erected or in process of erection, and operation at A. prior to the maturity of the note. *King v. Compress Co.*, 653.

11. Error in the charge in construing the condition of the contract in reference to the erection of a compress at A. was harmless where the evidence showed indisputably that no compress was erected or in process of erection at A. at the time of the maturity of the note sued on. *Id.*

**Contract of Leasing.**

1. Where plaintiff and defendant jointly executed a contract of leasing by virtue of which each party respectively leased certain lands to the other in exchange for a lease therein of the other's land, and such lease contract was made by plaintiff on the strength of defendant's representations that he was entitled to the use and control of the lands so leased by him to plaintiff, the latter was entitled to a cancellation of the contract upon proof showing that defendant did not, except in small part, own or control the lands he had undertaken to lease to plaintiff, and had not since acquired such ownership or right of control. *Singleton v. Houston*, 10.

2. It was immaterial that defendant's false representations as to his control of the lands were innocently made, as the case would still be one of legal fraud. *Id.*

3. The erroneous rejection by the court of evidence showing defendant entitled to the control of a part of the lands for a part of the term of the contract was immaterial where defendant's representations would still have been untrue to a material extent and plaintiff therefore entitled to a rescission. *Id.*

**Contribution.**

As between joint obligors. See *Lien*, 1.

**Contributory Negligence.**

As not defeating recovery. See *Discovered Peril*, 1.

Passenger sitting by open car window. See *Passenger*, 1.

Charge upon, not at right place. See *Negligence*, 6.

Question of, is for jury. See *Railroads*, 20; *Public Crossing*, 5.

How properly charged on. See *Charge*, 19.

Standing near street car track. See *Street Railway*, 1.

1. Charge upon the burden of proof on contributory negligence held not misleading as inducing the jury to consider only the evidence thereon offered by defendant. *Railway v. Elmore*, 56.

2. Where the uncontradicted evidence showed that plaintiff, who was blind in his right eye, did not stop and look before crossing a railroad track, and was struck by a moving car then being switched and approaching from the right-hand side, there was such proof of contributory negligence as required a reversal of the judgment in plaintiff's favor. *Gulf C. & S. F. Ry. Co. v. Holland*, 27 Texas Civ. App., 397, and *Texas Midland Ry. Co. v. Crowder*, 25 Texas Civ. App., 536, distinguished. *Railway v. Wyatt*, 119.

3. Evidence that plaintiff, who went upon a railway track and walked on it about twenty steps, did not observe an engine standing on the track near a depot some 800 feet away, facing toward him and in the direction in which he turned and walked, with his back to it, does not show that he was guilty of contributory negligence in so doing, as matter of law and over the verdict of a jury to the contrary. *Railway v. Miller*, 116.

4. Evidence considered, in case of a watchman on railway bridge run down by train, and held to show circumstances under which the question of his contributory negligence was one of fact for the jury, involving the effect of omission of usual signals, and his right to rely on them and to expect the train to be run within the speed limit required by the rules. *Railway v. Brock*, 155.

5. Where, in violation of the known orders of the railroad company, though with the permission of the conductor, deceased took passage on a freight train, and voluntarily assumed a dangerous position thereon, going



**Contributory Negligence—continued.**

upon an open flat car instead of into the caboose, and was killed through a derailment of the train caused by running it at an excessive rate of speed over a rough track, he was guilty of such contributory negligence as precluded a recovery for his death. *Following Railway v. Rogers*, 93 Texas, 677. *Railway v. Martin*, 186.

6. Under such facts the court would have been warranted in giving a charge which assumed that deceased was guilty of contributory negligence in so riding upon the train if he knew the rule was in force forbidding persons to ride on freight trains, and that the officers of the company were trying to enforce the rule, although the conductor may have given him permission to ride hereon. *Id.*

7. Running a freight train at an excessive rate of speed is not in itself such a reckless disregard of human life as will render the company liable for the death caused thereby of one who is a trespasser on the train. *Id.*

8. Where the main charge instructed the jury that if plaintiff failed to use ordinary care to avert and lessen his injuries, and that by reason thereof they were aggravated, he could not recover for such aggravation, a special charge instructing that if plaintiff did exercise ordinary care in attending to his wound, then defendant would be responsible for same, although the jury might believe that had he pursued some other course or adopted some other measures the injury would not have resulted so seriously—merely gave in an affirmative manner plaintiff's contention on the issue, and was not on the weight of evidence in giving undue prominence to that matter. *Railway v. Flood*, 197.

9. Charge on contributory negligence of driver of team in approaching a railway crossing which, it is held, should have been given. *Railway v. Booth*, 322.

10. A charge that one injured by his team running away, alarmed through negligence of a railway, could not recover "if, after the team became frightened, the plaintiff could have dismounted from the wagon with safety, and if, under the circumstances, a man of ordinary prudence would have dismounted," was erroneous because ignoring the effect of imminent peril in preventing prudent conduct. *Saunders v. Railway*, 383.

11. Evidence held sufficient to require the submission of a requested charge submitting the specific issue of contributory negligence arising thereon, in case of an employe of a cotton oil company injured by being caught in conveyor. *Oil Co. v. Gentry*, 445.

12. Charge of contributory negligence of an employe in an oil mill in choosing a dangerous path about the building instead of a safe one, held properly refused because ignoring the element of knowledge on his part of the danger. *Id.*

13. Contributory negligence not having been pleaded and plaintiff's evidence not having shown, as a matter of law, that he was negligent in the use of a ladder furnished him by defendants, it was not error to fail to charge on contributory negligence. *Hirsch Bros. v. Ashe*, 495.

**Conversion.**

1. Suit for the value of two bales of cotton, alleged to have been converted by defendants, a firm, can not be maintained where it is not shown that the person to whom they were sold was a member of such firm or acted for them or that the cotton was ever in possession of defendants. *Tucker v. Thomas*, 499.

2. A lease of land providing that three-fourths of the cotton grown and two-thirds of the pecans gathered should go to the lessee, constituted him a tenant in common of such crop with the lessor and entitled him to bring suit at any time after the conversion of the property by the lessor, without waiting until the lease expired. *Fagin v. Vogt*, 528.

3. While the lessee might have brought an action for restoration of possession of the premises upon conversion of the crop and his ejectment by the lessor, his failure to do so can not defeat his right to recover the value of his property unlawfully converted and disposed of by the lessor. *Id.*

4. The offer of the lessor, after suit was instituted by the lessee to recover the value of property unlawfully converted, to pay the lessee his portion of the proceeds of the crop and permit him to re-enter upon the premises and gather the remainder of the crop did not amount to a tender, but was only an attempt to compromise the suit. *Id.*

5. One tenant in common suing to recover for wrongful conversion by another tenant of his interest in a growing crop can not be charged with the cost of gathering such crop. *Id.*



**Conveyance.**

Of land by will not in writing. See Will, 3.  
 By married woman alone—ratification. See Married Woman.  
 See, also, Deed; Trust Deed.

**Copies.**

See Certified Copy; Evidence, 1, 40.

**Corporation.**

See Foreign Corporation; Partnership, 1.

**Costs.**

In probate matters. See Administration, 5, 6.  
 Allowed to a judgment defendant. See Life Insurance, 6.  
 Pauper's oath for, allowed. See Contested Election, 2.  
 Of appeal. See Mandamus, 5.  
 An attorney for a plaintiff, having become the owner of a part of the cause of action by transfer before suit is brought, is not thereby liable, as a party to the suit, for security for costs. *Railway v. Reeves*, 162.

**Cost Bond.**

See Appeal Bond.

**County Clerk.**

Act assigning fee of, to counties. See Constitutional Law, 1-4.

1. The power given the commissioners court by Revised Statutes, article 1537, to "audit, adjust and settle all accounts and claims in favor of the county," is not to be construed as authorizing the county to receive a less sum than is actually due, and a recitation in an order of that court to the effect that a county clerk has fully paid to the county all sums he owed it for excess fees will not estop the county from recovering excess fees which the clerk, with the assent of the court, withheld under a claim he was not entitled in law to make. *Tarrant County v. Butler*, 421.

2. Since the statute makes it the duty of the county clerks to properly keep the records and indexes of his office and fixes his fees for transcribing, comparing and verifying record books of his office at so much per hundred words, payable out of the county treasury, it was improper for the commissioners court to allow the clerk, in a gross sum, the excess of the fees of his office in compensation for the expense of providing new indexes for the records of his office in lieu of others worn out. *Id.*

**County Court.**

Appointing guardian on its own motion. See Lunatic, 2.

**County Judge.**

Bond of—compelling its approval by commissioners court. See Mandamus.

**County Taxes.**

1. A county tax collector has no right to receive a payment of taxes before the tax rolls of the county have been turned over to him, although such tax rolls have been duly assessed and approved, and a county may recover from the taxpayer the amount of taxes so paid but not accounted for by the tax collector. *Orange County v. Railway*, 361.

2. The public must take notice of the actual authority of public officers and know that they can not bind the government beyond it. *Id.*

**Creditors.**

Falling to file claims in time. See Administration, 7.  
 Insurable interest of, in life of debtor. See Life Insurance, 4, 5.  
 See, also, Sale in Fraud of Creditors.

**Crossing.**

See Public Crossing; Railroads, 15.

**Damages.**

See Measure of Damages; Personal Injury, 3, 6; Verdict.  
 From maintaining railway embankment in street. See Railroads, 7.  
 Not lessened because of accident policy. See Personal Injury, 4.  
 From decline in market price. See Carriers of Freight, 2.



**Damages—continued.**

Of special injury to land, without special pleading. See *Condemnation of Land*, 1.

Injury to cattle in transit. See *Shipment of Cattle*, 1.

Notice as essential to recovery of special damages from railway company. See *Mental Suffering*, 1.

Nominal damages entitling to verdict. See *Shipment of Cattle*, 1.

1. In an action of damages for personal injury the trial court has the power to correct the error of excess in the verdict by requiring a remittitur. *Railway v. Rhodes*, 432.

2. Evidence held sufficient to support a recovery of \$500 for personal injuries to a railway passenger from collision of train with an engine. *Railway v. Cain*, 539.

**Death.**

Right of action for trespass as surviving after death. See *Tort*, 1.

Caused by officer in making arrest—liability of his sureties. See *Official Bond*.

A charge that the damages recoverable for the death of a relative should be the "pecuniary loss, if any, sustained by the plaintiffs by reason of the death," was not erroneous in the absence of request for a charge limiting recovery to the present value of the future benefits reasonably to be expected had he not been killed.

**Decedents Estates.**

See *Estates of Decedents*.

**Declarations.**

Tending to impeach a witness. See *Contested Election*, 5.

In disparagement of title. See *Fraudulent Conveyance*, 1.

**Deed.**

Must be registered to extend possession to its boundaries. See *Limitations*, 4.

Possession under, restricted by execution sale of part of the land. See *Possession*, 1.

See, also, *Acknowledgment*; *Fraudulent Conveyance*; *Trust Deed*.

1. The rule that in the absence of other proof of delivery a deed is presumed to have been delivered on the date of its acknowledgment rather than on the date affixed to the instrument itself is but declaratory of the force of circumstances to establish the date of delivery, and is therefore absolute only when there is no other proof bearing on the issue of delivery. *Bogart v. Moody*, 1.

2. Deed bearing two acknowledgments of different dates, presumed, under circumstances stated in opinion, to have been delivered and to have taken effect from the date of the first rather than of the later acknowledgment. *Id.*

3. A contract for the sale of land describing it as "the 6100 acres under consideration in Tyler County," held not sufficient to comply with the statute of frauds nor to afford a basis for the admission of parol testimony to identify the land. *Penn v. Lumber Co.*, 181.

4. A deed never delivered nor placed on record by the grantor is ineffectual to protect an innocent purchaser from a grantee who had, without the maker's knowledge or consent, taken possession of it and had it recorded. *Garner v. Risinger*, 378.

5. Evidence held to support the conclusion that an acknowledged deed retained in the grantor's possession was not intended to take effect without manual delivery. *Id.*

6. Evidence held to support a finding against estoppel of a grantor, as against an innocent purchaser from grantee, to deny delivery of a deed by reason of his negligence in keeping it, the acknowledged instrument having been placed in a drawer in the home of the grantor of which the grantee was an inmate, and surreptitiously taken therefrom and placed on record by the grantee. *Id.*

7. The only issue being a question of reforming a deed from defendant to plaintiff for mutual mistake in describing the property conveyed, the fact that a mistake occurred and had been corrected in reference to some other deed to the same property could not influence the jury in their decision of the issue before them. Further, testimony of such mistake and correction having been admitted without objection, it was not error to admit in evidence the deed of correction itself. *Metcalfe v. Lowenstein*, 619.



**Deed—continued.**

8. Plaintiff conveyed the lot in controversy to defendant without consideration upon the agreement that he should soon reconvey, and in the deed of reconveyance the lot was described as lot 4 instead of lot 3 in a certain block. Evidence held to show that such misdescription was a mistake and a peremptory instruction to find for defendant on the ground that he knew the description contained in the deed was properly refused. *Id.*

**Degree of Care.**

See *Carrier of Passengers*, 1, 4; *Ordinary Care*.

**Delay.**

In presenting claims against estate. See *Administration*, 7.

In transporting cattle. See *Shipment of Cattle*, 1.

In prosecuting suit. See *Lis Pendens*, 1.

**Delegating Power.**

Administrator appointing agent. See *Administrator*.

**Delivery.**

See *Deeds*, 1, 4; *Promissory Note*, 1; *Telegraph*, 3.

Of deed treated at trial as established fact. See *Trespass to Try Title*, 2.

**Depositions.**

Reading from, where witness is present at the trial. See *Evidence*, 11.

See, also, *Continuance*, 4.

Answer to cross-interrogatory as to extent of witness' habit of using narcotics held sufficient to justify refusal of motion to quash the deposition for failure of the witness to answer. *Garner v. Risinger*, 378.

**Depot.**

Degree of care in keeping platform of, free of obstructions. See *Carrier of Passengers*, 4, 5.

**Description.**

See *Builder's Lien*, 2; *Deed*, 3, 7, 8; *Will*, 4.

Mistake in, with foreclosure of lien. See *Mechanic's Lien*, 2.

**Devise.**

See *Charitable Devise*.

The terms "building" or "houses" include the real estate on which they are situated unless the general meaning of the terms is modified by the language of the context, and an absolute devise of the entire rents of a named property will carry the property also. *Gidley v. Lovenberg*, 203.

**Discovered Peril.**

Issue of, raised by the evidence. See *Charge*, 7.

Cases involving. See *Negligence*, 7, 9.

1. A railway company is liable where its employees discover the perilous situation of a person in going upon its track and by warning could have prevented injuring him, though such a person is guilty of contributory negligence in going upon the track. Evidence considered and held to present this issue. *Railway v. Gibson*, 66.

2. Evidence that before a slowly moving engine struck plaintiff, and in time to have given him warning, the fireman was standing up in the engine looking south, the direction the engine was moving, raised the issue of discovered peril and required a charge thereon. *Railway v. Miller*, 116.

3. Under the rule allowing witnesses to state the appearance of things coming under their observation it was permissible for a witness to state that he could not say who the fireman in an engine was looking at just before the engine struck plaintiff, "but he looked to me like he was looking at plaintiff." *Railway v. Miller*, 116.

4. A charge that if railway employees operating a train saw a person on the track in time to avoid striking him it became their duty to exercise ordinary care to avoid collision, held not to be upon the weight of evidence when considered in connection with other charges. *Railway v. Brock*, 155.

5. If either the conductor or motorman on an electric car perceived the fright of a horse by the sounding of the gong, it was his duty to have it stopped, though he was not the one sounding it. *Railway v. Powell*, 454.



**Discovered Peril—continued.**

6. Submission of the issue of negligence on the part of those operating an electric car in maintaining too high speed after discovery that a horse was alarmed thereby, held warranted by pleading and evidence. *Id.*

7. An engineer or motorman may not act upon the theory that a person on or near the track, who sees the car approaching, will get out of the way of danger, after it becomes reasonably apparent that this will not be done. *Railway v. Craig*, 548.

**Dismissal.**

As authorizing appeal. See Judgment, 6.

**Disparagement of Title.**

Declarations in. See Fraudulent Conveyance, 1.

**Divorce.**

The wife's continued denial to the husband of the privilege of sexual intercourse, can not, alone, furnish ground for divorce, unless under conditions rendering it insupportable cruelty. *Varner v. Varner*, 381.

**Draft.**

See Bank Draft; Unaccepted Draft.

**Earning Capacity.**

Damages for impairment of. See Evidence, 31.

**Elections.**

See Contested Election; Local Option Election.

**Electricity.**

In a suit upon a contract to furnish current enough to run a 75-horse power motor for purposes of irrigation the court properly refused a requested charge that "the warranted capacity of the electrical motor described in the contract upon which plaintiff sues is 75-horse power, but any additional horse power which said motor could safely develop and which was required to perform its work \* \* \* is also within the warranted capacity of said motor within the meaning of said contract," such charge being objectionable: (1) Because the warranty as to the horse power of the motor, not being evidenced in writing and being a matter in dispute, the charge was on the weight of evidence. (2) It assumed that defendant contracted to furnish such quantity of current as the motor would safely stand, however much horse power it might develop, if plaintiff's pump required more to perform the work put upon it. *Wofford v. Irrigation Co.*, 531.

**Endowment Policy.**

See Life Insurance, 3.

**Engineer's Report.**

Oral proof of entry therein. See Evidence, 39.

**Equitable Title.**

Of heirs in deceased mother's community interest. See *Innocent Purchaser*, 2, 3.

**Estates of Decedents.**

See Administration; Probate Sale.

Article 1996, Revised Statutes, allowing suits and executions against the estates of decedents, is not in conflict with article 5, section 16, of the State Constitution, conferring on county courts general jurisdiction over probate matters. *Epperson v. Reeves*, 167.

**Estoppel.**

By covenant of warranty—after acquired title. See Mortgage, 1.

To deny delivery of a deed, as against subsequent purchaser. See Deed, 6.

Plaintiff sued out a writ of mandamus in the Supreme Court to compel the Commissioner of the General Land Office to award him the section of school land here in controversy, and the judgment of that court determined against him the principal issue of law involved in his claim against the defendant here for the land. Plaintiff there sued in the district court in trespass to try title



**Estoppel—continued.**

to recover the land, and sought to controvert the facts which he had admitted in the application for mandamus in order to obtain the ruling of the Supreme Court on the question there presented. Held, that he was not entitled to have the same matters litigated twice, and was estopped from controverting the facts which he had alleged or accepted as undisputed in order to obtain the ruling in the mandamus case. *Tolleson v. Wagner*, 677.

**Evidence.**

Objections to admission of, must state the grounds. See Practice on Appeal, 1.

Recitals in trustee's deed. See Trust Deed, 4.

Showing identity of an original grantee. See Land Certificate, 2.

See, also, Admissions; Depositions; Witness.

1. Article 2306, Revised Statutes, making duly certified copies of all public records admissible as evidence, does not exclude the common law method of proving such records by an examined copy, and hence the classification of school land as shown on the records of the General Land Office could be proved by an examined copy. *Smithers v. Lowrance*, 25.

2. Where the examined copy was made by an outside person, it seems that the evidence of the custodian of the record should have been adduced to show that the record from which such copy was made was the genuine record of classification in the Land Office, but no objection on this ground was made below, and so can not be urged on appeal. *Id.*

3. Error in excluding plaintiff's proof of the classification and appraisalment of the land was not rendered harmless by the fact that he failed to show that he was an actual settler on the land at the time of his application to purchase it, by virtue of which he sued, since said proof would have been unavailing without the indispensable proof of classification and appraisalment. *Id.*

4. Where a witness had testified in substance that he knew the market value of the cattle in question, stating what it was at J., the point of shipment, and also at their destination, and that in their damaged condition they were worth at destination about what they were worth at J., his statement that, "taking into consideration everything in connection with the cattle, I would say that they were damaged at least \$2.25 per head," was in effect but a short method of stating the difference in the market value of the cattle at J. and at their destination. *Railway v. Halsell*, 126.

5. An assignment of error to the admission of certain evidence will be overruled where the bill of exceptions taken to the action of the court in overruling objections to it wholly fails to show that the evidence was in fact admitted. *Id.*

6. A transfer of a land certificate coming from the proper custody, dated more than forty years ago, and under which title has been claimed, with no circumstances casting suspicion on its genuineness, is admissible without proof of its execution or that it had actually existed for twenty years, though its genuineness had been attacked by affidavit. *Simmonds v. Simmonds*, 151.

7. A transfer of a land certificate "No— issued in said county of W., for one-third of a league of land, to me, the said W. C., as a headright," sufficiently identifies the duplicate one-third league headright certificate of the person transferring it, and evidence that an augmentation certificate for two-thirds of a league and labor was subsequently issued to the same party, had no tendency to disprove such identity. *Id.*

8. A certified copy, from the records of the Land Office, of an affidavit by a third party that he was the owner of the headright certificate on which patent to the land in controversy was issued, is not admissible in disparagement of the title of another claiming the land by transfer from the grantee of the certificate. *Id.*

9. A party can not introduce evidence of his own character for truth, which has not been impeached otherwise than by the introduction of evidence conflicting with his own. *Id.*

10. Evidence held to show permanent injuries to a railway switchman warranting introduction of mortality tables as evidence. *Railway v. Reeves*, 162.

11. Where plaintiff was present and testified at the trial, and defendant's counsel, in cross-examination and for the purpose of impeaching her, interrogated her as to certain answers she had made in a deposition of hers on file in the case, it was admissible for her to read in evidence, from the deposition, her answer to one of the interrogatories therein. *Wilson v. Wilson*, 192.

12. The matter of permitting the deposition of a witness to be read in evidence after he has testified on the trial rests largely in the discretion of the trial court, and its action therein will not be ground for reversal unless it is made to appear that such discretion has been abused to appellant's injury. *Id.*

13. Plaintiff's counsel, in the examination of certain witnesses on the trial,



**Evidence—continued.**

exhibited to them a piece of old wire netting such as is used in spark-arresters of engines and sought to have them identify it as part of the spark-arrester of the engine in question, but they did not so identify it, and the court thereupon told the jury not to consider the piece of netting at all nor the testimony in reference to it, as it was excluded. No special charge in writing was required in reference to the matter. Held, that the presumption obtains that the jury were not influenced by the evidence. *Railway v. Flood*, 197.

14. In a prosecution for breach of a liquor dealer's bond for selling intoxicants to plaintiff's minor son, it was error to permit defendant to prove that such minor was reputed to be or that he was in fact a gambler. *Poyner v. Holzgraf*, 233.

15. In a suit for selling liquor to a minor it was not permissible for defendant to place witnesses on the stand merely to ask them their age, whether for comparison with the appearance of the alleged minor for any other purpose. *Id.*

16. A plaintiff suing for injuries received in getting off a moving train should not have been permitted to testify that he could have got off safely if the train had not been jerked at the time; it was, in effect, permitting a non-expert to give an opinion on the question of his own negligence. *Railway v. Long*, 339.

17. Where the keeper of a baptismal record, since deceased, had made an entry on the record of the date of the party's birth as well as of his baptism, the date of birth could not be proven by the record since it was a fact not appearing to have been within the knowledge of such keeper, and hence hearsay. *Bailey v. Fly*, 410.

18. Proof that a party, testifying in the case, has been, in various church trials, charged with and found guilty of unministerial conduct, embezzlement, slander, and false swearing, was not admissible. *Donaldson v. Dobbs*, 439.

19. Question to a medical expert as to apparent time the injuries testified to by him had continued held not inadmissible because leading and suggestive. *Railway v. Powell*, 454.

20. Testimony of a medical witness as to having been called in various cases by other doctors held admissible in view of a cross-examination intimating conspiracy between him and the other attending physician who had called him into the case to make out a case of damages for plaintiff. *Id.*

21. Evidence that the street where injury occurred was much traveled by the public was admissible as bearing on the extent of care due from those operating an electric car along it. *Id.*

22. Excluded evidence offered to prove that a keeper of defendant's pumping station had received instructions before, and at another place than the one where the accident happened, not to allow people on the premises, held immaterial where the testimony showed that he had no authority to invite people on the premises. *Railway v. Bulger*, 478.

23. Letters and telegrams from an electric company, from whom a motor was bought, addressed to defendant, were admissible upon the issue of warranted capacity of the motor where the evidence shows that defendant acted as the agent of plaintiff in the purchase of the motor. *Wolfford v. Irrigation Co.*, 531.

24. Complaints of suffering in his back, made by plaintiff in a suit for personal injury, held admissible as original evidence, as being expressions of present pain. *Railway v. Cain*, 539.

25. Admission of improper evidence is not ground for reversal if the same evidence has come in at another point without objection. *Railway v. Baker*, 542.

26. The fact of the sale of a railroad by one company to another may be proved by parol though the contract was in writing. *Railway v. Hall*, 545.

27. The courts being required to take judicial knowledge of the special law under which the International & Great Northern Railroad Company purchased the road of the Calvert, Waco & Brazos Valley Railroad Company, know therefrom that the purchaser assumed the liabilities of the selling road. *Id.*

28. Pedestrians are not chargeable with negligence in walking on a railway track located along a public street except where circumstances show a lack of ordinary care in so doing; and it was proper to charge that they had an equal right with the railway to use such street. *Id.*

29. Running an engine along a public street at a speed prohibited by, or omitting signals required by a city ordinance is negligence in law; in the absence of proof of the ordinance negligence in high speed or omission of signals is a question of fact. *Id.*

30. The ordinance of a city incorporated under the general law can not be proved by the introduction of a pamphlet purporting to contain them without



**Evidence—continued.**

other proof that it was published by authority of the city council than a printed statement on the back of the pamphlet; neither article 558 nor article 2304 of the Revised Statutes authorizes ordinances to be so proved. *Id.*

31. The fact that plaintiff, disabled by his injuries, was compelled to hire a foreman at \$25 per week was evidence bearing on his earning capacity. *Railway v. Chapman*, 551.

32. Where transfers of school lands were recorded in the proper counties and then filed in the General Land Office, and certified copies from the county records were offered in evidence, the fact that the originals were archives of the Land Office sufficiently accounted for their nonproduction. *Tollison v. Wagner*, 577.

33. Where deceased was run over by an engine, dying three hours afterwards, and within five minutes after the injury, and while he was still lying on the track, a conversation occurred between him and the man who was in charge of the engine as to why the latter did not see the deceased on the track in front of the engine when he could have seen him, such conversation was admissible as *res gestae*. *Railway v. Jones*, 584.

34. A witness who had had fourteen months' experience as an engineer was competent to testify as to the distance ahead at which one operating an engine can see an object on the track. *Id.*

35. A petition to recover for personal injuries in derailment of tram car having alleged as a cause defect in the brakes in that the brake wheel was too small to furnish sufficient leverage, it was proper to strike out from a deposition of a witness for plaintiff the statement that the brake was "wood-bound," in answer to a question as to the condition of the brake and the efforts made to stop the car with it, but to permit the reading of the rest of the answer, that plaintiff and witness "used every means in our power to get the brake to work, but the brake failed to work," over objection that it was immaterial, irrelevant, the opinion of witness, and not confined to the defects in the track alleged. *Cement Co. v. Ross*, 597.

36. The admission of improper evidence held immaterial where instruction was afterwards given to disregard it. *Id.*

37. Plaintiff could testify to the amount expended by him for medicines in consequence of injury to his person though to an amount exceeding that alleged in his petition; but an instruction limiting recovery therefor to the amount alleged would have been proper. *Id.*

38. On proof of failure to maintain a light at a street crossing as required by a city ordinance, evidence as to how lights were kept at other crossings was immaterial; or, if material, its exclusion became harmless error when the court declined to submit the absence of light as a ground for recovery. *Railway v. Matherly*, 604.

39. A locomotive engineer could testify that he had entered a certain defect in a locomotive in a book kept by the railway for such reports, without notice given to the defendant company to produce such writing. *Railway v. Crum*, 609.

40. In an action for damages resulting from a change in the wording of a telegram, made in transmitting it, copies of the telegram furnished by the telegraph agent at the initial and terminal points were offered in evidence by plaintiff. The defendant was not notified to produce the original; neither the sender nor the addressee was called upon to testify, nor were the transmitting and receiving agents of the telegraph company, and no effort was made to account for the nonproduction of the original telegram as delivered. Held, that the admission of the copies in evidence, over objection that a proper predicate had not been laid, was error. *Telegraph Co. v. Kapp*, 663.

**Examined Copy.**

Of public records. See *Evidence*, 1.

**Exceptions.**

Overruled—issue not submitted. See *Harmless Error*.

**Executrix.**

See *Practice on Appeal*, 5.

**Expert Evidence.**

See *Evidence*, 34; *Opinion*.

**Failure to Look**

While walking on railway track. See *Contributory Negligence*, 3.  
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**Fees.**

See Attorney Fees; Costs.

Surplus fees of county clerk's office. See Constitutional Law, 1-4; County Clerk.

**Fellow Servant.**

In operation of a gravel train. See Railroads, 18.

1. A charge making the master responsible for injury to his servant "by the wrongful act of a fellow servant whom the employer had placed over and given superintendence of the work of the servant who was injured," was erroneous. Only those intrusted with power to employ or discharge are vice-principals. *Manufacturing Co. v. Femelat*, 34.

2. The master is responsible for the results of a command given by a foreman to one placed under his control, to the same extent as though the command were given by the master, irrespective of the foreman's power to employ or discharge. *Id.*

3. A brakeman on a train was not a fellow servant with the porter who unloaded freight at a station. *Railway v. Elmore*, 5, 6.

4. Under the Acts of 1891, p. 25, sec. 2, and of 1893, p. 120, sec. 2, the respective grade of employment of two servants was determined by the power of superintendence or control; but by the Act of 1897 (Rev. Stats., art. 4560h) the rule is changed, and grade of employment must be determined by other considerations, as order of promotion, skill or compensation. *Id.*

5. Whether a porter unloading freight at a station, and a brakeman calling out the articles for the agent to check upon the way bills were working together to a common purpose questioned but not decided. *Id.*

6. The engineer of a construction train, operating for the purpose of laying ties on a railroad track being constructed ahead of it as it moves along, and another employe whose duty it is to assist in unloading and laying the ties, both working under the direction of the same foreman, and in the employ of contractors who have undertaken the construction work, are fellow servants while engaged in such work. *Overton v. McCabe and Steen*, 133.

7. Evidence considered and held insufficient to show that the foreman in charge of the train give an order to the engineer which resulted in plaintiff's injury. *Id.*

8. Evidence held to show a "cleater" or "sealer," whose duty it was to inspect and hang the doors of freight cars and to cleat to the floor of the cars the "iron run" upon which trucks were rolled into and out of the cars, not a fellow servant with a truckman employed to load and unload freight into the cars within the meaning of article 4560h, Revised Statutes. Charge on negligence of defendant in failing to inspect a car door which fell and injured plaintiff held correct. *Railway v. Hutchens*, 343.

**Final Account.**

See Administration, 1, 2.

**Final Judgment**

From which appeal may be taken. See Judgment, 6.

**Flagman.**

Failure to keep, at crossing. See Public Crossing, 1.

**Foreclosure.**

With mistake in description of the property. See Mechanic's Lien, 2.  
Separate suits for the debt and for foreclosure. See Liens, 3.

**Foreign Corporation.**

1. Bonds of the city of Baltimore owned by a Maryland surety company and deposited by it with the State Treasurer of Texas, in accordance with section 2 of the Act of June 10, 1897, for the purpose of enabling such company to do business in this State, were liable to rendition and taxation for State and county purposes in the county of Travis, in which they were so held by the Treasurer. *State v. Deposit Co.*, 214.

2. Municipal bonds owned by a Maryland corporation and deposited by it with the State Treasurer of Texas, in Travis County, for the purpose of obtaining a permit to do business in the State were the personal estate of a moneyed corporation within the meaning of article 5063, Revised Statutes, and were properly taxable there under the laws of the State. *Id.*

3. The State Treasurer, as bailee of bonds deposited with him by a corporation of another State in order to obtain permission to do business in



**Foreign Corporation—continued.**

Texas was such an agent or trustee as was authorized by the statute to render the same for taxation; and if not, the adoption of his rendition by the county officer was sufficient, it being his duty to list unrendered property. *Id.*

4. A foreign corporation manufacturing articles sold in this State through its agents was not required to obtain a permit to do business in Texas, and consequently suit could be brought for purchase price of its goods without pleading and proving such permit. *Cash Register Co. v. Berry*, 554.

**Foreman.**

See *Fellow Servants*, 2; *Railroads*, 17.

**Forfeiture.**

Of school land purchase. See *Mortgage*, 1.

**Former Suit.**

As determining amount of the debt—subsequent suit for foreclosure. See *Practice on Appeal*, 3.

As furnishing ground of estoppel. See *Estoppel*, 1.

**Fraud.**

See *Sale in Fraud of Creditors*.

As ground for rescission. See *Contract of Leasing*, 1, 2.

In indorsing note, to give jurisdiction. See *Promissory Note*, 3.

In procuring a deed absolute. See *Trespass to Try Title*, 3.

As depriving of right to commissions. See *Administration*, 9.

In procurement of judgment. See *Judgment*, 3.

In sale of an article. See *Contract*, 8, 9.

In written contract, shown by oral evidence. See *Parol Evidence*.

**Fraudulent Conveyance.**

See *Sale in Fraud of Creditors*.

Where a creditor had subjected to his claim certain land the title to which was in the name of J. D., the debtor, and suit was brought therefor on behalf of a minor son of the debtor, having the same name as the father, upon the claim that the minor was the person named and intended in the deed of the land, evidence of declarations by the father to the effect that the property was his, and that he wished it put out of the way of his creditors, was admissible and could not be excluded on the ground that such declarations were in disparagement of the son's title.—the material issue being as to the identity of the grantee in such deed. *Mathews v. Epstein*, 515.

**Garnishment.**

Fund assigned by draft, held not subject to. See *Bank Draft*.

Plaintiff having a claim against a contractor, was not entitled to garnish a deposit which the contractor had made with a surety company as an indemnity for bonding him, where the amount which the surety company owed the contractor, after deducting commissions and attorney fees, was yet unsettled and not ascertainable. *Lumber Co. v. Surety Co.*, 346.

**General Land Office.**

Proof of transfers filed in. See *Evidence*, 32.

**Good Faith.**

See *Improvements*.

**Growing Crops.**

Cost of gathering. See *Conversion*, 5.

**Guardian.**

Legal proceedings by, as notice to minor. See *Notice*, 3.

Suit by, in name of ward. See *Lunatic*, 4.

Appointed by county court on its own motion. See *Lunatic*, 2.



**Harmless Error.**

In admitting evidence. See Evidence, 25, 38; Condemnation of Land, 3; Contract, 11.

In giving and refusing charge. See Charge, 4, 21, 24; Public Crossing, 6; Trespass to Try Title, 2.

Error in overruling exceptions to a pleading becomes immaterial where the issues raised by such pleading were not submitted to the jury. *Bolton v. Prather*, 295.

**Hearsay.**

Entry of date of birth in baptismal record. See Evidence, 17.

Evidence excluded as hearsay and self-serving declarations. *Donaldson v. Dobbs*, 439.

**Heirs.**

Of deceased wife suing for her community interest. See Innocent Purchaser, 2, 3.

1. A half brother, born after the death of one owning a remainder in land, is not an heir of such remainderman; the estate in remainder vested in the existing heirs of the latter at her death. *Kesterson v. Railway*, 235.

2. Plaintiffs suing, as heirs of their deceased parents, to recover damages for injury to property occurring before the death of the parents, could not recover the whole amount of the damages in the absence of proof that they are the sole heirs, or any part thereof without showing what proportion of the whole damages they, as heirs, were entitled to recover, the burden of proof of the extent of their interest being upon plaintiffs. *Railway v. Smith*, 351.

**Homestead.**

Rights of lunatic in, not affected by his removal. See Lunatic, 3.

Agreement to give lien on. See Contract, 4.

On public land. See Public Land, 1.

As subject to street improvement tax. See City Charter, 2.

1. A merchant who has sold out his stock and business and leased the building to another, can not sustain his claim to hold it exempt from execution as his business homestead by reason of his intention to resume business therein, when the evidence shows no present ability to resume nor reasonable expectation of being able to do so in the immediate future. *Grocery Co. v. Peter*, 47.

2. Evidence considered and held to support a claim of business homestead by one who, selling out a merchantile business and leasing his building to another, continued to occupy an office in it for the business of buying cotton and taking orders for clothing by sample. *Id.*

**Husband and Wife.**

See Community Property; Divorce; Married Woman; Illicit Relations.

There being community debts at the time of the death of the wife, the husband had the right to sell community property for the purpose of paying such debts. The purchaser's title was good as against a claim for the land by the heirs of the wife, and he was not bound to see that the purchase money was applied to the payment of the community debts. *Linson v. Poindexter*, 358.

**Identity.**

Of grantee—father and minor son with same name. See Fraudulent Conveyance, 1.

**Illicit Relations.**

1. The presumption is that illicit relations between parties, one of whom is married, continued illicit after dissolution of the marriage, and where it is sought to show that the illicit relations have changed to legal ones the burden rests upon the one attempting to show such change. *Edelstein v. Brown*, 625.

2. Illicit relations began between parties while the woman had a lawful husband living and continued after his death, the parties living apart and seeing each other only occasionally. These relations existed for several years until they finally took up their abode together and represented themselves as man and wife. Such state of facts held insufficient to show a



**Illicit Relations—continued.**

common law marriage, at least until they agreed to live together, and heirs of the woman by a former legal marriage could not recover any interest in land as community acquired before such agreement. *Id.*

3. *Yates v. Houston*, 3 Texas, 442; *Bonds v. Foster*, 36 Texas, 68; *Bull v. Bull*, 29 Texas Civ. App., 364, explained as in harmony with the rule that where the original relations between parties were illicit a change in that relationship must be shown before the presumption of a common law marriage can arise. *Id.*

**Imminent Peril.**

As relieving from contributory negligence. See *Negligence*, 10.

**Impeachment.**

Of witness by showing an indictment for perjury. See *Witness*, 2.

**Improvements.**

Pay for, on recovery by a tenant in common. See *Tenants in Common*, 1. Value of, offset by rents. See *Trespass to Try Title*, 1.

Good faith is alike indispensable to the statutory plea of improvements where plaintiff recovers an undivided interest or when he recovers it all. *Kesterson v. Bailey*, 235.

**Indemnity.**

Agreement for, construed. See *Usury*, 1.

**Independent Executor.**

Required by the will to file yearly reports. See *Will*, 2.

**Indorser and Indorsee.**

A bank to which a customer has indorsed a note of a third party, and which, after it has notice of the maker's defense of failure of consideration has funds of the indorser on deposit which it could apply in discharge of such indorser's liability on the note, can not enforce its collection against the maker on the plea of innocent purchaser. *Van Winkle Gin Co. v. Citizens Bank*, 89 Texas, 147, followed. *Bank v. Blakey & Co.*, 87.

**Injunction.**

To restrain breach of contract. See *Contract*, 1.

Return of, where county has two district courts. See *Judgment*, 1.

1. Where the damages for breach of the contract are fixed by agreement and the defendant is not insolvent the remedy at law is complete, and injunction will not lie to restrain a breach. *Rucker v. Campbell*, 178.

2. Where damages were liquidated, and their amount too small to give the court jurisdiction, and no right to the injunction claimed in support of the jurisdiction is shown, the case should be dismissed. *Id.*

3. An injunction which did not attack the validity of a judgment foreclosing a lien on property or attempt to stay its execution, but was granted merely to protect property from sale upon which a lien was claimed superior to that held by the parties owning the judgment, might properly be returned to another county than the one in which the judgment was rendered. *June Co. v. Doke*, 240.

**Innocent Purchaser.**

Protected against want of consideration. See *City Bonds*, 2; *Promissory Notes*, 3.

From one holding under a recorded deed never delivered. See *Deed*, 4, 6. When bank not protected as. See *Indorser and Indorsee*.

1. Purchasers of land need not go behind the patent in their investigation of title unless put upon inquiry by some extraneous fact or by the recitals in the patent or subsequent link in their chain of title. *Wimberly v. Pabst*, 55 Texas, 592. *Bogart v. Moody*, 1.

2. One who purchases land from the holder of the legal title, without notice of the existence of an equitable title in the heirs of the deceased member of the community, or of facts and circumstances reasonably sufficient to put him upon inquiry, takes title free from the claim of the owners of the equitable community title. *De Witt v. Britton*, 485.



**Innocent Purchaser—continued.**

3. The facts that an heir of a deceased member of a community estate was over twenty-one years old, working elsewhere and boarding with the family on the premises, held not to show such possession as would be notice of an equitable title in him, the records showing the legal title in the survivor of the community. *Id.*

**Insane Person.**

See Lunatic.

**Inspection.**

See Master and Servant, 4, 5; Ordinary Care; Charge, 15.

**Insurance.**

See Life Insurance.

**Intention.**

See Charge, 31; Mutual Mistake, 1; Sale in Fraud of Creditors, 2.

**Interest.**

Administrator charged with. See Administration, 8.

Interest which is the legal consequence of the debt or obligation sued on may be recovered though not claimed in the petition. *Hipp v. City of Houston*, 30 Texas Civ. App., 573. *Houston v. Lubbock*, 106.

**Interrogatories to Party.**

Where the refusal of a party to the suit to answer interrogatories pro-pounded by his adversary is made under a belief that he was entitled to demand witness fees and followed by timely offer to answer on learning better, it should not be treated as an admission. *Donaldson v. Dobbs*, 439.

**Interstate Commerce.**

The Texas Short Line Railroad Company which had, in building its road into Grand Saline, contracted with a salt company there for the transportation of 66 per cent of such salt company's product to any points on connecting lines, undertaking to meet any rate offered by other connections, having accepted a shipment at a rate published by the Texas & Pacific road and its connections to the destination in another State, routing same over its own line and the Missouri, Kansas & Texas Railway, there being no published through rate by such route, and the sum of the local rates thereon exceeding the rates charged, tendered the shipment to the Texas & Pacific road at the latter's published through rate and on refusal to accept it sued for the difference it was compelled to pay in shipping over the Missouri, Kansas & Texas and its connections. **Held:**

(1) The defendant was not justified in refusing the shipment by the requirement of the interstate commerce law that it should transport for no less nor greater amount than its published rates.

(2) The Short Line company, as bailee of the property under its contract, had the same right as the manufacturer to demand the transportation of the property by defendant for it at the latter's published through rate without transporting it over any part of its own line, though having no agreement with defendant for such through rate.

(3) The contract between the Short Line company and the salt company was not void as against public policy.

(4) The Short Line company was not obliged to publish the through rates made by other companies in order to avail itself of them in shipping over their lines, nor compelled to accept the sum of the locals instead of their published through rate.

(5) The fact that the salt was tendered in cars of other companies gave defendant no right to refuse the shipment, its right being to load into its own if it wished to avoid the mileage charge on foreign cars.

(6) The unlawfulness of plaintiff's shipment over the Missouri, Kansas & Texas and its connections, without a published through rate and at less than the sum of locals by that route could not justify defendant's refusal to transport at its own published rate which compelled plaintiff to adopt that route. *Railway v. Railroad Co.*, 387.



**Intoxication.**

As not precluding recovery for personal injury. See Railroads, 24.

**Joinder.**

Of owner of the equitable title in suit for recovery of the land. See Trespass to Try Title, 4.

**Joint Tortfeasors.**

Liability of. See Carrier of Passengers, 7.

**Judgment.**

Entry of, nunc pro tunc. See Will, 1.

Proved by parol—records burned. See Lis Pendens, 4.

Binding on purchaser pendente lite. See Lis Pendens, 5.

See also, Injunction, 2, 3; Verdict, 3.

1. In a county having two district courts, suit may be maintained in one to enjoin the sale, under execution issuing out of the other court, of land exempt as homestead; the statute (Rev. Stats., art. 2996) requiring injunctions to stay execution on a judgment to be tried in the court in which the judgment was rendered has no application. *Grocery Co. v. Peter*, 49.

2. In the absence of a statement of facts, all facts necessary to support the findings and judgment of the trial court will be presumed, on appeal, to have been proven. *Varner v. Varner*, 381.

3. Where the judgment in a suit by publication recites that the defendant was duly and legally cited to appear, and that he appeared by his attorney under appointment of the court, fraud in its procurement does not render it void within itself, but merely affords ground to have it declared void by a proper proceeding seasonably instituted for that purpose. *Scudder v. Cox*, 416.

4. Where the suit effects the title of land owned by the defendant, a purchaser from him takes the land subject to the contingencies of the suit; and, as a privy in estate, he is bound by the judgment, and can not collaterally attack it upon an allegation of fraud in its procurement. *Id.*

5. Where, in an action to try title to land, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid the effect of the judgment by alleging fraud in its procurement, this is a collateral and not a direct attack upon the judgment. *Id.*

6. A judgment in justice court that the case of plaintiff, who appeared and announced ready, but refused to plead or introduce evidence, be dismissed for want of prosecution and defendant go hence without day, was a final judgment from which plaintiff might prosecute appeal. *Moore-Mayfield Co. v. Railway*, 607.

**Judgment by Default.**

1. Where a judgment by default in a suit by publication contained no recitals as to service on the defendant it was subject to collateral attack because of noncompliance of the citation or notice with the requirements of the statute. *Babcock v. Wolfarth*, 512.

2. Where a citation for publication was issued prior to the taking effect of a statute in relation to such process, but was not published until after the statute had taken effect, its sufficiency was to be determined by the provision of such statute. *Id.*

3. Under the statute (Acts 1897, p. 138) requiring that a citation to unknown defendants in a tax suit shall run in the name of the State and county, and shall be "directed to all persons owning or having or claiming any interest" in the land in suit, a citation running in the name of the State only and directed to the sheriff, commanding him to summon "unknown owner whose residence is unknown" to appear and answer, is substantially defective and a judgment based thereon is void. *Id.*

**Judicial Discretion.**

In permitting deposition to be read after the witness has testified at the trial. See Evidence, 12.

In limiting number of impeaching witnesses. See Witness, 1.

In permitting counsel to read authorities to jury. See Jury.

In approving official bond. See Mandamus, 1.



**Judicial Notice.**

Taken of a certain special law. See Evidence, 27.

The court takes judicial notice that the common law doctrine of fellow servants obtains in Arkansas by virtue of section 566, Mansfield's Digest, and that this statute was put in force in the Indian Territory by the act of Congress passed May 2, 1890. *Overton v. McCabe and Steen*, 133.

**Jurisdiction.**

Of injunction suit, where two district courts in same county. See Judgment, 1.

1. The court in which a suit for damages was pending when defendant settled with plaintiff therefor had jurisdiction, on intervention of assignees of an interest in the amount so recovered, to determine the right of such assignees to recover from defendant their proportionate interest in the amount so paid in settlement. *Railway v. Eldredge*, 467.

2. The fact that an insane person is confined in an asylum situated in another county than the one in which her estate is situated does not deprive the latter county of its jurisdiction in matters of guardianship of her estate, her residence still remaining in such county. Rev. Stats., art. 2566. *Flynn v. Hancock*, 395.

3. Where damages are liquidated, and their amount too small to give the court jurisdiction, and no right to the injunction claimed in support of the jurisdiction is shown, the case should be dismissed. *Rucker v. Campbell*, 178.

**Jury.**

Bias of juror. See Condemnation of Land, 2.

Exhibiting injured limb to. See Personal Injury, 2.

It is within the discretion of the court to permit counsel to read extracts from legal authorities to the jury in argument, and ground for reversal only when such discretion appears to have been abused to the prejudice of the opposite party. *Railway v. Moody*, 46.

**Killing Live Stock.**

At place where law prohibits stock running at large. See Railroads, 12, 14.

**Knowledge.**

Of defect in appliance. See Master and Servant, 8.

**Laches.**

In claiming debt against an estate. See Administration, 7.

**Land.**

See Condemnation of Land; School Land; Public Land; Title to Land; Trespass to Try Title.

Devise of a "building" carries the land beneath it. See Devise.

**Land Agent.**

Suit by, for commissions. See Pleadings, 3.

**Land Board.**

Issuing unconditional certificate by mistake to administrator. See Land Certificate, 4.

**Land Certificate.**

Proof of transfer—ancient instrument. See Evidence, 6, 7.

Description of. See Probate Sale, 1.

1. A recital in an unconditional land certificate issued by a land board of a county that the grantee in the original certificate was dead and his administrator entitled to the unconditional certificate was not conclusive against those claiming as heirs of the original grantee where the evidence shows that he was not dead at the time the unconditional certificate was issued and had never sold the land. *Davis v. Bargas*, 88 Texas, 622; *Dick v. Malone*, 24 Texas Civ. App., 97; *Smith v. Walton*, 82 Texas, 547; *Clifton v. Hewitt*, 56 S. W. Rep., 132, distinguished. *Buster v. Warren*, 644.

2. Evidence considered and held sufficient to justify a finding that one under whom plaintiff's claim was the person to whom the original certificate, under which the land in controversy was located, was issued, notwithstanding the unconditional certificate and the judgment of the county court on the



**Land Certificate—continued.**

application for administration, recited that the grantee in the original certificate had died prior to the date of the issuance of the unconditional certificate, where the evidence shows that the original grantee did not die until several years afterwards. *Id.*

3. Article 4150, Paschal's Digest, construed, in view of article 4178, as not requiring three years residence in the State after issuance of conditional certificate in order to perfect his title. *Id.*

4. A finding by a land board that at the time of the issuance of an unconditional land certificate the original grantee was dead would not divest him of title to the land where he was in fact still living, nor be conclusive that the original grantee was another person than the one shown to be living when the unconditional certificate was granted. *Id.*

**Landlord's Lien.**

1. In an action by a landlord against a purchaser from a tenant of cotton subject to the landlord's lien wherein there was evidence tending to show that, as part of the rental contract, it was agreed by plaintiff that the tenant might market and sell the cotton and pay the landlord his one-fourth rental in money, it was error for the charge to instruct the jury that plaintiff had the right in law to afterward revoke such consent and forbid the sale of the cotton without informing the defendant. A mere gratuitous consent might have been so withdrawn. *Compress Co. v. Howard*, 300.

2. Evidence showing that defendant bought the cotton in ignorance of the fact that the seller was the tenant of plaintiff and of any consent on his part to the sale does not raise a question of estoppel as against the defendant, the question in the case being one of waiver or abandonment of the lien on the part of plaintiff. *Id.*

**Landlord and Tenant.**

Common source in suit between. See *Trespass to Try Title*, 6.

Plaintiff, a landlord, had a contract with his tenant for one-fifth of the rice raised on his place and notified defendant of such contract after the rice was taken there to be milled but before it was sold. Defendant having sold the rice turned all the proceeds over to the tenant upon the tenant's representation that he was plaintiff's agent and authorized to receive the money for the sale. Evidence considered and held insufficient to support defendant's plea that plaintiff, by his actions, induced it to believe that the relation of agency existed between him and the tenant. *Post v. Rice Milling Co.*, 642.

**Leading Question.**

To a medical expert. See *Evidence*, 19.

An interrogatory is not necessarily leading because it can be answered by yes or no, if it does not suggest the answer expected. *Railway v. Baker*, 542.

**Lease.**

See *Contract of Leasing*; *Lease of School Lands*.

Lessor and lessee as joint owners of the crops. See *Conversion*, 2, 4.

1. Plaintiff verbally leased from a railroad local agent a part of the right of way for placing a coal bin thereon. After he had taken possession, the agent came to him with a written lease, executed by the general superintendent, containing a clause exempting the road from liability for injury to the lessee's property caused by fire. Plaintiff signed the lease, stipulating verbally that he did not assent to the exemption clause. The agent had no authority to make the verbal lease. The coal bin was destroyed by fire caused by sparks from an engine, after the expiration of the lease. Held, that plaintiff's verbal reservation from the written lease of the exempting clause was ineffectual; that his holding over after the lease had expired would be presumed to be under the terms of the written lease, and that a judgment denying him recovery for the property so destroyed was correct. *Woodward v. Railway*, 14.

2. A lease of property giving the lessees permission to improve the premises as they desire and providing that "this lease is to continue for such time as the said Wilson & Runnels or either of them may desire to use the same," is construed as creating a tenancy at the will of the lessees and is therefore at the will of the lessor. *Beauchamp v. Runnels*, 212.



**Lease—continued.**

3. The only power conferred upon administrators, in connection with the repair of improvements on estates, is to keep the buildings in tenantable repair (Rev. Stats., art. 1983) and under a lease contract an administrator could not bind the estate for improvements made by the lessee. *Rice v. Conwill*, 341.

**Lease of School Land.**

1. Defendant assigned and transferred to plaintiff a consolidated lease of certain State school lands which was void to the greater part of the lands because made by the Land Commissioner for a longer period than the unexpired constituent leases. Held, that as the constituent leases remained in force despite their unauthorized cancellation because of the consolidated lease, a plea of failure of consideration for the assignment of the consolidated lease was not tenable, the defendant transferring the actual possession of the land at the time the lease was assigned. *Scott v. Slaughter*, 524.

2. The quitclaim by which the assignment and transfer of the lease was made being without covenant of warranty, there could be no abatement of the purchase money for a partial failure of title. *Id.*

3. The assignee of the lease could not, in order to avoid his contract, set up the want of the State's consent to the assignment, since that did not render the assignment void, but only voidable, and the State having sought no forfeiture of the lease on that ground, the want of its consent to the assignment was not to be inferred in order to thus practically work a forfeiture of the lessee's rights. *Id.*

4. Where money was voluntarily paid under a mutual mistake of law as to the validity of the consolidated lease, such mistake in and of itself afforded no ground for recovering back the money. *Id.*

**Legal Title.**

Purchaser of, without notice of equitable (community) title. See Innocent Purchaser, 2.

Holder of, suing for the land without joining equitable owner. See Trespass to Try Title, 4.

**Lex Loci.**

Applied as to mental suffering—interstate message. See Telegraphs, 2.

**Lien.**

See Builder's Lien; Landlord's Lien; Mechanic's Lien; Vendor's Lien.

Notice of, to agent, binding principal. See Notice, 2.

On policy for premiums paid. See Life Insurance, 4, 5.

Agreement to give, on homestead. See Contract, 4.

See, also, Injunction, 3.

1. Where one or two joint obligors has discharged the debt on which both were bound, and with it the lien it held on property respectively bought by them, a court of equity may render a money judgment against the co-obligor for his proportion of the debt, and is not restricted to making it a charge against such co-obligor's part of the property. *Wilkerson v. Bacon*, 44.

2. Where one has a first lien on the machinery in a gin plant and another a first lien on the building and lots, each having also second liens, the machinery should be sold separately from the building and lots. *June & Co. v. Duke*, 240.

3. Suit for a debt and one to foreclose a lien given to secure the debt may be brought separately. *Silliman v. Taylor*, 490.

4. In a suit by a landlord against a tenant upon an account for rent and advances furnished the tenant, no lien could be enforced on items for pasturage of stock and hire of a team, these being separate and distinct from the contract for rent. *Tucker v. Thomas*, 499.

**Life Estate**

Until death of holder of, limitation less does not run against remainderman. See Limitations, 1.

**Life Insurance.**

1. An employer's liability policy issued by a casualty insurance company to a cotton oil and gin company indemnifies the latter against loss from liability for damages on account of bodily injuries, fatal or otherwise, suffered by any employe of the assured while on duty within the factory, shop or yards,



**Life Insurance—continued.**

in or during the operation of the business of the assured. Held to cover liability for injury to a carpenter in the regular employ of the assured, received while removing some scaffolding that was no longer necessary after the plant had been installed and put in operation. *Casualty Co. v. Oil Co.*, 260.

2. The beneficiary named in a life insurance policy, or an assignee thereof, must have an insurable interest in the life of the insured, and when such interest ceases, then interest in the policy terminates. *Hatch v. Hatch*, 373.

3. A wife's interest in a policy on her husband's life ceases upon obtaining a decree of divorce, regardless of whether or not it was his fault that caused the divorce; and that the policy contained an endowment feature does not affect the matter, nor entitle the wife to the surrender value of the policy at the date of the divorce. *Id.*

4. A creditor has an insurable interest in the life of the debtor, but only to the extent of the indebtedness. The wife having paid certain premiums on the policy out of her separate estate, was entitled, upon the divorce, to a lien on the policy for the amount of the premium so paid. *Id.*

5. A moneyed judgment against the husband in the wife's favor in the divorce suit, rendered on matters in no way connected with or pertaining to the policy in her favor on the husband's life, gave her no right in or lien upon the policy as a creditor of the husband. *Id.*

6. Where a husband assigned an endowment policy on his life to his wife, and was afterwards divorced from her, and brought suit on the policy against the insurance company, joining the wife, and the company answered that it was ready to comply with the contract of insurance as soon as it was properly determined who was the owner of the policy, it was entitled to recover its cost and attorney fees in the case and have the same made a lien on the policy. *Id.*

**Limitations**

As against damages caused by construction and operation of railroad in a street. See *Railroads*, 6, 7.

Sale by trustee under power after debt barred. See *Trust Deed*, 1.

Running against minor. See *Notice*, 3.

In action to compel filing account. See *Administration*, 3.

1. The statute of limitation does not begin to run against persons claiming under a tenant in remainder until the death of the tenant for life—holding under the latter not being adverse to the remainderman. *Kesterson v. Bailey*, 235.

2. In answering to a plea of limitation those claiming under one who had an estate in remainder are not required to plead any exception which would prevent the running of the statute of limitation, since persons having a life estate in the land had the right of possession by virtue thereof and their possession was not adverse to those entitled to the remainder. *Id.*

3. One can recover, under a plea of limitation of ten years, only that portion of the land in controversy shown to have been actually occupied by him, or 160 acres, if his possession be less than that, by virtue of article 3344, Revised Statutes, where his possession is not under a deed or other written memorandum of title duly registered. *Doom v. Taylor*, 251.

4. The requirement of the statute that, to entitle the party in possession of land to hold to the boundaries described in any written memorandum other than a deed under which he claims, such memorandum must be duly registered, applies also to deeds. *Id.*

5. A mere admission that one has received money lawfully due another does not establish against him such a continuing trust as would prevent the running of limitation. *Bridgens v. West*, 277.

6. Evidence that one fenced part of the land claimed by him and built a small house thereon, these improvements remaining six or seven years when the fence was taken down and sold, in the absence of evidence showing who occupied the premises during this time or the length of such occupancy or any cultivation or use of the premises by such person or anyone holding under him, was insufficient to support a title of limitation by adverse possession. The record showing that the facts were not fully developed upon the issue of limitation, the cause should be reversed and remanded for a new trial. *Buster v. Warren*, 644.

**Liquidated Damages.**

As precluding injunction to prevent breach of the contract. See *Contract*, 1.

A contract fixing the damages for breach of a contract not to re-engage in business treated as one for liquidated damages and not as a penalty. *Rucker v. Campbell*, 178.



**Liquor Dealer.**

Selling to minor—proof. See Evidence, 14, 15.  
Pleading in suit on bond of. See Pleading, 5.

**Lis Pendens.**

1. What lapse of time would amount to negligence sufficient to defeat the force of the suit as a pending action is a question to be determined with reference to the circumstances of each particular case, and under circumstances here considered is held not sufficient. *Jones v. Robb*, 263.
2. In view of a lapse of thirty-eight years, death of the parties interested in the transaction, and the almost total destruction of all the records bearing on the question, the testimony of a witness, as to declarations made at the time, was admissible to establish the bringing of a suit in a certain county and its transfer to another, and the presumption will be entertained that it was regularly made. *Id.*
3. By agreeing to a change of venue and thereby consenting to the removal of all the papers in a case, a litigant does not lose the right to invoke the rule of *lis pendens*. *Id.*
4. The papers in a suit having been destroyed, parol evidence was admissible to show that a judgment in favor of an intervener and against the claim asserted by a defendant was recovered by such intervener by agreement and in the interest of such defendant, and to explain thereby the effect of such judgment on the rights of a purchaser pendente lite. *Id.*
5. A purchaser pendente lite is bound by the judgment subsequently rendered therein, though it was by agreement, unless collusive and invoked by one who was a party to or chargeable with notice of the collusion. *Id.*

**Live Stock.**

Killing where law prohibits their running at large. See Railroads, 12-14.  
See, also, Carrier of Freight, 6-8; Shipment of Cattle.

**Loan.**

Building contract held to be. See Usury, 3.

**Local Option Election.**

1. The fact that the election officers closed the polls for about an hour at noon, while they went to dinner, no one being prevented from voting thereby, did not render illegal the votes cast at such voting place. *Hoover v. Thomas*, 535.
2. Though the local option law so far as it authorizes the combining of two or more justice precincts of a county into a subdivision thereof for holding an election for the prohibition of the sale of liquors under the local option law should be held unconstitutional (*Ex parte Heyman*, 45 Texas Crim. Rep., —), such ruling would not involve the constitutionality of an election under the laws for the entire county. *Id.*
3. Though parties who had not paid their city poll tax were permitted to vote at a county election under the local option law the election was not invalidated thereby in the absence of a showing that the exclusion of such votes would have altered the result. *Id.*
4. The local option law as to elections for counties held not violative of the State or of the Federal Constitution. *Id.*

**Lost Papers.**

Parol proof of judgment where records burned. See *Lis Pendens*, 4.  
Substitution of a lost petition in a suit should be by a substantial copy of the original, and an amended petition, attempted to be substituted, should be stricken out on motion. *Hamilton & Co. v. Telegraph Co.*, 602.

**Lunatic.**

1. The fact that an insane person is confined in an asylum situated in another county than the one in which her estate is situated does not deprive the latter county of its jurisdiction in matters of guardianship of her estate, her residence still remaining in such county. *Rev. Stats.*, art. 2566. *Flynn v. Hancock*, 395.
2. A county court has the authority to appoint a guardian for a lunatic on its own motion. *Rev. Stats.*, arts. 2574, 2742. *Id.*
3. The detention of a lunatic in an asylum, being involuntary on her part, does not affect the homestead character of her estate. *Id.*
4. Suit for property of a lunatic was properly brought in her name by her guardian. *Id.*



**Mandamus.**

In Supreme Court. See Estoppel, 1.

1. The approval of the official bond of the county judge by the commissioners court is a matter involving the exercise of judicial discretion, and mandamus does not lie to control that discretion. *Gouhenour v. Anderson*, 569.

2. Mandamus will lie, however, to compel the court to take action on a bond tendered to it, by either approving or rejecting it; and arbitrary action on the part of the court, whether from caprice or bad motive, is not the exercise of judicial discretion. *Id.*

3. Where in an action by mandamus against the commissioners court it was shown that the county judge tendered his official bond to the court for approval, and the court entered an order neither in terms approving nor rejecting the bond, but directing that the judge be cited to appear before the court at a date named to make bond, and at such designated date no meeting of the court was held, the evidence was such as to require the submission of the issue of whether or not the court passed upon the bond tendered, or arbitrarily postponed action thereon through a desire to oust relator from his office. *Id.*

4. Where, before the hearing of the mandamus, the commissioners court had declared the office of county judge vacant because of failure on the part of relator to give an acceptable bond, and a new judge had been appointed who had received the resignations of a majority of the commissioners and appointed new ones in their stead, such new judge, and perhaps also the new commissioners, should have been made parties to the action, and the trial court should have refused to proceed further until this was done. *Id.*

5. The judgment being reversed because of the failure to make new parties below, appellant (the relator) will not be taxed with the costs of appeal on the ground that he took no steps to have new parties made, where appellees urged upon the trial court the view that their resignations put an end to the controversy and entitled them to have the suit abated, and the reversal is also predicated in part on error in the charge in failing to submit a material issue raised by the evidence. *Id.*

**Market Value.**

Of cattle; proof of. See Evidence, 4.

Reckoned at point of destination, as between connecting lines. See Carriers of Freight, 7.

Opinion as to, held not admissible. See Measure of Damages, 1.

**Married Woman.**

See Husband and Wife; Divorce.

1. The act of a married woman in attempting to convey land by deed to her children, without being joined by her husband and having no power of attorney from him to act as his agent, though professing to act as such agent in conveying, was, in itself, void; but where, after the death of her husband, she had a guardian appointed for her children, represented the land to be theirs, and acquiesced in and received the proceeds of the sale of the land by the guardian, such ratification of the deed estopped her and her heirs to set up title against the purchaser at guardian's sale. *Morrison v. Balzer*, 247.

2. A certificate of acknowledgment by a married woman showing that she "being by me examined, privately and apart from her husband, and having the foregoing instrument fully explained to her, acknowledged the same to be her own act and deed and that she did not wish to retract therefrom," is insufficient in failing to show acknowledgment that she had willingly signed the deed. *Tiemann v. Cobb*, 289.

**Master and Servant.**

Risks assumed where servant is young and inexperienced. See Minor, 1, 2.

1. It was error to charge the jury to find for plaintiff if they believed from the evidence that plaintiff was young and inexperienced in working around moving machinery, and defendant, knowing his youth and inexperience, sent him into a place of danger without warning him of such danger, without requiring the jury to find that such acts constituted negligence on defendant's part and that appellee was not guilty of contributory negligence in obeying such orders. *Manufacturing Co. v. Femelat*, 36.

2. The master is not liable for the acts of the servant in doing that which the master has no right to do and has not authorized, though such acts are done in good faith and with the intention to further the master's interest. *Railway v. Mayfield*, 82.

3. Plaintiff having been injured in getting off a freight train on which he was a trespasser, a charge instructing the jury to find for plaintiff if his injuries or sufferings were increased by the wrongful act of the servants of the



**Master and Servant—continued.**

railway in taking him, against his will, away from his home, the place where he was injured, to another town, for medical attention, was erroneous, plaintiff having failed to show that such acts of the servants were authorized or done in the prosecution of the master's business. *Id.*

4. A servant is not required to exercise even ordinary care to discover defects, though patent, in appliances furnished by the master, but could assume that they were safe, and in acting upon such assumption assumed no risk unless he actually knew of such defects. Charge on assumed risk held correct. *Railway v. Davis*, 285.

5. Evidence held not to show a duty of servant engaging in moving freight on a truck to inspect the appliances used by him. *Id.*

6. Charge on continuance of servant in employ in reliance on promise to repair defects of which he has complained held correct and sufficiently full in the absence of request for more specific instructions. *Railway v. Baker*, 543.

7. The promise of the master to repair defects which will relieve the servant from assumption of risk therefrom need not be to repair in a definite time. Till a reasonable time for compliance has elapsed the servant may continue work in reliance on the promise. *Id.*

8. The servant though knowing the machinery was defective, as that the washout plug of a locomotive engine was leaky, did not assume the risk of danger not implied by such condition, such as injury from such plug blowing out. *Railway v. Crum*, 609.

**Measure of Damages.**

Profits as affording. See Contract, 5.

In case of cattle shipped over connecting lines. See Carriers of Freight, 7. Rule of, stated. See Shipment of Cattle, 4.

Special damages; pleading and notice to carrier required. See Shipment of Cattle, 2.

The measure of damages for injury to a peach orchard was the difference between the market value of the land upon which the orchard was situated before and after such injury, and it was error to permit witnesses to give their opinion as to the market value of the land where the testimony showed that they were not acquainted with the market value of plaintiffs' land or of similar land with orchards thereon. *Railway v. Smith*, 351.

**Mechanic's Lien.**

1. The rule that equity will correct a mutual mistake in a voluntary contract applies to a mechanic's lien which described the property upon which the lien was given as situated on lot 8 instead of lot 7; and such correction may be had though the lien is given on the homestead with the wife's separate acknowledgment. *Silliman v. Taylor*, 490.

2. The fact that a mistake in a mechanic's lien which described the property as situated on lot 8 instead of lot 7, was not discovered until after judgment foreclosing the lien had been obtained and the property sold under such judgment, can not defeat plaintiff's right to have said mistake corrected and a foreclosure upon the property intended to be described in the lien. *Id.*

**Medical Expenses.**

In case of a minor. See Pleading, 1.

Proof of, exceeding amount claimed. See Evidence, 37.

**Mental Suffering.**

Evidence of, held not pertinent. See Telegraphs, 1.

Recovery for, denied; interstate message, and rule of *lex loci* applied. See Telegraphs, 2.

1. The failure of the employes on defendant's train to stop at a flag station when flagged warranted a judgment for damages for personal inconvenience caused by plaintiff being forced to walk two miles in the dark over rough roads; but was not ground for recovery of damages for mental anguish caused by delay in reaching a dying grandchild under circumstances not known to those who failed to stop on his signal. *Railway v. Sammon*, 96.

2. Mental pain may be inferred from the existence of physical suffering, as an element of the measure of damages. *Railway v. Chapman*, 351.

**Minor.**

Denied recovery for cost of medical attention—father liable. See Pleading, 1.

Warning to, and contributory negligence. See Master and Servant, 1.

Bound by litigation conducted by his guardian. See Notice, 3.



**Minor—continued.**

Selling liquor to. See Evidence, 14, 15.

Attorney's part interest in recovering claim for. See Verdict, 3.

1. Where a minor has the same experience and knowledge as an adult he is held to assume the ordinary risks which he understands, and a master employing such minor is not required to warn him any more than an adult of dangers which he could ascertain by the ordinarily careful use of such knowledge and experience as he possesses. *Tucker v. Investment Co.*, 474.

2. An experienced farm hand, though a minor, is held to have assumed risks incident to loading sheaf oats on a wagon frame and riding thereon over a road well known to him, and can not recover for injuries sustained by the oats sliding and causing him to fall. *Id.*

**Mistake.**

See Mutual Mistake.

In application to purchase. See School Land, 1.

In description of property. See Deed, 7, 8.

Of law; no relief for. See Lease of School Land, 4.

**Mortality Tables.**

In case of permanent injury. See Evidence, 10.

**Mortgage.**

1. L. and wife executed a deed of trust, with covenants of warranty, on a section of school land which had been purchased from the State by the wife. Proof of three years' occupancy of the land by them had been filed in the General Land Office and accepted, but afterwards the purchase of the land was forfeited by the State for nonpayment of interest and, the land having been reclassified, it was purchased from the State by L., and was conveyed by him to the wife as her separate property. Subsequently the land was sold at trustee's sale under power in the deed of trust, and the purchaser thereunder brought this suit against L. and wife for its recovery. Held, that by virtue of the covenants of warranty in the deed of trust defendants were estopped to set up the after-acquired title of L. *League v. Atkeson*, 303.

2. *Lamb v. James*, 87 Texas, 485, and cases following it, distinguished. School lands are not public domain after award and proof made of three years' occupancy, but are subject to execution and mortgage sale; citing *Martin v. Bryson*, 31 Texas Civ. App., 98. *Id.*

**Motorman.**

Of street car; negligence of. See Charge, 25; Discovered Peril, 6.

**Municipal Bonds.**

See City Bonds; Taxation, 2.

**Municipal Corporation.**

Right of counties to excess fees of officers. See Constitutional Law, 1-4.

See, also, City Charter; City Officer.

**Mutual Mistake.**

Defective allegation of, cured by verdict. See Pleading, 9.

Of law—no relief for. See Lease of School Land, 4.

Whether or not it was the intention of the parties to convey the lot in controversy governs the question of mutual mistake in description, and not whether either party knew that the lot was described as No. 4, it being in fact No. 3, in a certain block. Requested charges on this point held properly refused. *Metcalf v. Lowenstein*, 619.

**Name**

Of grantee—father and minor son of same name. See Fraudulent Conveyance.

"Wm. Read" identified as "W. M. Read." See School Land, 5.

**Negligence.**

See Contributory Negligence.

With reference to minor, not warned. See Master and Servant, 1.

In failing to give signals. See Public Crossing, 4.

In running down watchman on bridge. See Railroads, 8.

In not ascertaining that a concern was not incorporated. See Partnership, 2.



**Negligence—continued.**

- In getting off moving train. See Evidence, 16.
- In running engine in street too fast. See Evidence, 29.
- In killing live stock. See Railroads, 13.
- Foreman giving order at wrong time. See Railroads, 17.
- Of foreman and fellow servant concurring. See Railroads, 19.
- In allowing grantee to get possession of deed. See Deed, 6.
- In allowing child to be scalded. See Charge, 18.
- In obstructing street. See Street, 1.
- 1. Only acts which are contrary to statute, or are so opposed to the dictates of prudence that reasonable minds can reach no other conclusion than that no person of ordinary care would commit them, are deemed in law negligence per se. See pleading setting up the circumstances attending the injury of a minor employed in a wood-working shop by getting his hand caught in a circular saw, held to present a case where negligence was a question of fact and it was not the law that he could recover if injured as stated. *Manufacturing Co. v. Femelat*, 36.
- 2. Deceased, in the discharge of his duty, was attempting to pass through a space between two cars standing on the track when he was caught and killed by the cars being pushed together for the purpose of making a switch. A charge that defendant would be liable for damages if the jury believed that the employees failed to have a lookout to discover and prevent injury to persons on the track can not be construed as requiring the company to station a man on the end of the car which struck plaintiff, but simply required the use of reasonable care in keeping a lookout to prevent injury to persons who might go on the track after the cars were put in motion; nor was it relieved from such duty by having sent a man to see if the track was clear before putting the cars in motion. *Railway v. Levy*, 107.
- 3. Where a judgment for death of a servant is sustained on the ground that the injury was caused by negligence of another employe (not his fellow servant) and without contributory negligence of deceased, no question of assumed risk is involved; risks arising from such negligence are not assumed by the servant. *Railway v. Brock*, 155.
- 4. Where danger, real or apparent, caused by defendant's negligence is relied on as having caused the act of the injured party which, in the effort to escape such threatened danger, caused the injury, and not merely as excusing contributory negligence, such negligence of defendant can not be considered a proximate cause of the injury unless the circumstances created, in the mind of the injured person, a reasonable apprehension of danger. *Railway v. Booth*, 322.
- 5. On the issue of negligence by a railroad company in jerking a train while plaintiff was getting off from it in motion, a charge that it was defendant's duty to use ordinary care to keep from injuring him while he was attempting to alight was error, in ignoring the question of the defendant's notice of the fact that he was about to alight, which was not cured by an instruction correctly stating the law in another paragraph. *Railway v. Long*, 339.
- 6. A charge which instructs the jury to find for plaintiff if injured by defendant's negligence, ignoring the issue of contributory negligence, is not cured by the proper submission, in another paragraph, of contributory negligence as constituting a defense. *Id.*
- 7. Evidence considered and held sufficient to support a verdict for \$1000 damages for the death of plaintiffs' child at a railroad crossing caused by failure of defendant to give signals and to use every means in their power to prevent the injury after discovery of the perilous position of deceased. *Railway v. Allen*, 355.
- 8. An ordinance limiting the speed of street cars within city limits makes a higher rate of speed negligence if injury result therefrom. *Railway v. Powell*, 454.
- 9. Evidence considered and held to show negligence on the part of a motorman on a street railway car in failing to stop or check the speed of a car on seeing plaintiff dangerously near the track, where the steps extended out further from the body of the car than those generally in use on that line. *Railroad v. Craig*, 548.
- 10. The violation of a city ordinance regulating the running of engines and trains within the city constitutes negligence and the court may so charge. *Railway v. Matherly*, 604.
- 11. The question whether a city ordinance on the subject is an unreasonable restriction on the right of a railway to operate its trains must be raised by proper pleadings and proof. *Id.*



**Negotiable Instrument.**

See City Charter; City Bonds; Promissory Notes.

**New Trial.**

1. Plaintiff sued three railroad companies for injuries to cattle occurring on a through shipment, alleging delays and negligence on each line, and recovered judgment in separate amounts against each defendant. After the case had gone to the jury he stated to witnesses for two of the roads that he did not know why they were brought to court, as he had no complaint to make against those two roads on account of delays or treatment of the cattle while in their possession, as the injury occurred on the third road. Held to require the granting of a new trial on the ground of newly discovered evidence. *Railway v. Clark*, 189.

2. A motion for new trial which is not passed on during the term in which it is filed but continued, is discharged by operation of law upon adjournment of court for that term and any subsequent action of the court with reference thereto was without jurisdiction and void, and appeal must be taken within the time limited from the date of the judgment, not from that of overruling the motion. *Clements v. Buckner*, 497.

3. The trial court properly sustained an exception to a motion for new trial filed twenty days after rendition of judgment, not showing why it was not filed sooner and not sworn to. *Wofford v. Irrigation Co.*, 531.

**Nonresident.**

Taxing deposited bonds of foreign corporation. See Taxation, 1.

**Nonsuit.**

Where defendant asks affirmative relief. See Reconviction, 1.

**Notes.**

See Promissory Notes.

**Notice.**

Of consignee's refusal to receive goods. See Carrier of Freight, 2.

Of danger to employe. See Contributory Negligence, 12.

To debtor, of assignment of debt. See Assignment, 2.

Of claim of title by possession. See Innocent Purchaser, 3.

To shippers, so as to authorize special damages. See Shipment of Cattle, 2.

See also, Judicial Notice; Negligence, 5; Notice to Produce.

1. Notice to the station agent at another place or to the conductor on another train of the object of a passenger's trip and his intention to return that night was not notice to the employes of the train which refused to stop for him when flagged nor to the company. *Railway v. Sammon*, 96.

2. Notice to the agent of a machinery house that there was a builder's lien on certain houses was notice to his employers, and the builder's lien was superior to a deed of trust subsequently given on such buildings and the machinery therein. *June & Co. v. Doke*, 240.

3. A minor was charged with notice of facts disclosed by the record in a legal proceeding to which her guardian was a party, and can not void the subsequent running of limitation on plea of ignorance and concealment of such facts. *Bridgens v. West*, 277.

4. The use, in a charge, of the term "constructive notice" with reference to circumstances charging defendant with duties arising from the fact that plaintiff was attempting to get off its train while in motion, though inaccurate, was not misleading, where the circumstances which would be equivalent to notice were correctly stated. *Railway v. Long*, 339.

**Notice to Produce.**

1. A letter press copy of a letter addressed to and presumably in the possession of the opposite party is not admissible in evidence where no notice to produce the original has been given. *King v. Compress Co.*, 653.

2. The rule admitting secondary evidence of an instrument without notice to produce where the original is out of the jurisdiction of the court does not apply where the original is in the possession of a party to the suit. *Id.*

**Nunc Pro Tunc Entry.**

Of judgment. See Will, 1.

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**Ordinary Care.**

To discover employes on and about the track. See Railroads, 21.

A truckman injured by the falling of a car door was not required to use even ordinary care to discover whether a door was properly fastened where there was an inspector hired for this very duty. *Railway v. Hutchens*, 343.

**Outstanding Title.**

Defendant connecting himself with, by pleadings. See Trespass to Try Title, 7.

**Official Bond.**

Compelling approval of. See Mandamus, 1.

See also, City Officer, 4, 5.

The ruling on former appeal herein (*Moore v. Lindsay*, 31 Texas Civ. App., 13) holding the sureties of a constable liable in damages for his wrongful act in killing one whom he was attempting to arrest upon a lawful warrant approved and followed. *Black v. Moore*, 613.

**Officer.**

See City Officer; County Clerk.

**Opinion.**

That plaintiff "could have left the moving train safely, if it had not been jerked." See Evidence, 16.

As to value of land. See Measure of Damages, 1.

**Parent.**

Recovery for death of son. See Charge, 13.

**Parol Evidence.**

To identify land. See Deed, 3.

Of judgment—records burned. See Lis Pendens, 4.

Of sale of railroad, made in writing. See Evidence, 26.

See also, Written Contract; Pleading, 4.

Parol evidence may be introduced to show fraud through which a contract has been obtained. *Cash Register Co. v. Berry*, 554.

**Parol Reservation.**

See Lease, 1.

**Parties.**

See Mandamus, 4; Interrogatories to Party; Trespass to Try Title, 4.

Where judgment was had against three railroad companies for damages occurring to cattle in a joint shipment over them as connecting lines, and it appeared that one of the roads was not served with notice of the suit and did not enter an appearance, the judgment was reversed and the cause dismissed as to that defendant. *Railway v. Halsell*, 126.

**Partition.**

See Tenants in Common.

**Partnership.**

See Conversion, 1.

1. One buying shares of stock in a business on the representation and in the belief that it was an incorporated company, it not being such, did not become a partner in the business by holding such stock, nor so liable as a partner for the depreciation in the value of the business and property by mismanagement to those conducting it as to prevent his maintaining action to rescind the sale to him and recover back the amount paid on discovery of the facts, though owing to such depreciation he could not replace the seller in statu quo. *Bolton v. Prather*, 295.

2. Evidence held insufficient to show negligence by a purchaser of stock in a business in failing to sooner discover that it was a partnership instead of a corporation, as the seller represented it to be. *Id.*



**Passenger.**

See Carrier of Passengers.

Allegations of time, place and manner of injuries to. See Pleading, 2.

1. A passenger injured by reason of a cinder from the engine entering his eye was not guilty of contributory negligence in sitting by an open car window through which the cinder entered the car. *Railway v. Flood*, 197.

2. A limitation of liability, in a railroad pass, signed by the recipient of the pass, whereby he assumes all risks of accident or damage to person or property, is void as against public policy. *Id.*

**Pauper's Oath.**

See Appeal, 1; Contested Election, 2.

**Penalty.**

Right to, assigned to another. See Usury, 1.

See also, Liquidated Damages.

**Personal Injury.**

Complaints of suffering held admissible. See Evidence, 24.

See also, Damages, 2; Charge, 2; Pleading, 2; Verdict, 1, 6.

1. Evidence of a plaintiff as to his conduct as affected by his injury—his subsequent work at his trade and desisting from same—held admissible. *Railway v. Flood*, 197.

2. There was no error in permitting a plaintiff to exhibit an injured limb to the jury to show the extent of injury sustained. *Id.*

3. The fact that at the time of his injury plaintiff was not actually engaged in any employment and was not earning anything will not preclude a recovery for the value of his time lost on account of the injury, as it will not be presumed that he would not have secured employment had he not been injured. *Id.*

4. In an action for personal injury evidence was not admissible on the issue of contributory negligence to show that the injured person carried an accident policy which had since been paid, as this could not have the effect of reducing the compensation, if any, to which he was entitled. *Id.*

5. Requested charges, in an action for injury resulting in a broken collar bone, excluding from the jury's consideration the effect of a former breaking of that bone, held sufficiently covered by the main charge. *Railway v. Barrett*, 366.

6. A verdict for \$2500 for injury resulting in a broken collar bone, with permanent injury to one shoulder, held not excessive. *Id.*

7. Evidence considered and held sufficient in an action to recover damages for personal injuries caused by plaintiff's falling from a ladder, to require a special charge submitting the issue of defendant's knowledge of defects when they furnished the ladder to plaintiff. *Hirsch Bros. v. Ashe*, 495.

8. In corroboration of the claim of an injured woman to be disqualified for household work, evidence was admissible that they kept hired help as long as they were able after the injury, and that after that she was assisted in household work by her husband and children. *Railway v. Powell*, 454.

**Permit.**

Not necessary, when. See Foreign Corporation, 1.

**Pleading.**

Defects in, cured by verdict. See Verdict, 4.

Substitution of lost. See Lost Papers.

Assumed risk to be pleaded. See Railroads, 25.

Interest recoverable without. See Interest, 1.

In answer to plea of limitations. See Limitations, 2.

Outstanding title. See Trespass to Try Title, 7.

Particularity in, not required. See Condemnation of Land, 1.

Amendment of, allowed as under the general rules. See Contested Election, 1.

See also, Allegata and Probata; Contributory Negligence, 13; Plea of Privilege.

1. In the absence of allegation and proof of facts which would render plaintiff, a minor, liable for the cost of medical attention furnished him, his parents being primarily responsible for such cost, he can not recover such expenses. *Manufacturing Co. v. Femelat*, 36.



**Pleading—continued.**

2. Allegations of the time, place and manner of receiving his injuries, by a passenger hurt by sudden jerking of train, held sufficiently definite as against a general demurrer. *Railway v. Moody*, 46.

3. Evidence considered and petition held to show a good cause of action on an oral agreement provided that a real estate dealer should be paid a commission for securing purchasers for a tract of land, where such purchasers were found and showed a willingness and ability to purchase upon the terms agreed upon between the owner and the agent. *Wilson v. Clark*, 92.

4. The agent negotiating a sale of land for the owner was not bound by the terms of a contract in writing between such owner and the purchaser found by him in relation to the proposed sale; though it secured for the purchaser a mere option, on payment of earnest money, and did not bind the purchaser to take the land, such agent, in a suit to recover his commissions from the owner, could show that the purchaser was willing and able to take the land on the terms at which the owner authorized him to sell. *Id.*

5. A petition alleging breaches of a liquor dealer's bond as having been made "on or about the 23d day of December, 1901, and on divers days before and after said date during said month," was not subject to special exception for being too vague, indefinite and uncertain. *Patton v. Williams*, 129.

6. Pleading and evidence held to properly raise the issue of negligence on the part of defendant in failing to keep appliances in repair. *Railway v. Reeves*, 162.

7. A petition alleging negligence of defendant in respect to furnishing a safe car embraced a negligent inspection or failure to inspect such car. *Id.*

8. Allegation of injury received in jumping from wagon in terror at alarm of team by railway train held sufficient to show that there was actual danger though not directly so stating. *Railway v. Booth*, 322.

9. Where, in an action to correct a mistake in a division of land, plaintiff's petition alleged that the error was due to "some mistake, inadvertence, accident or miscalculation," a failure to allege that the mistake was mutual was cured by the verdict, and objection on that account could not be made for the first time on motion for new trial. *Lewis v. Batten*, 370.

10. Allegations in pleading held to show assignment of claims to plaintiff and hence a right to bring the suit. *Silliman v. Taylor*, 490.

**Plea of Privilege.**

In case of railroads jointly sued. See *Railroads*, 10, 11.

By drawer in suit on draft. See *Unaccepted Draft*, 2.

**Policeman.**

See *City Officer*.

**Political Question.**

Location of State boundary. See *Sovereignty*.

**Poll Tax.**

Voting without payment of. See *Contested Election*, 3.

**Possession.**

Bare actual, gives right to only 160 acres. See *Limitations*, 3, 4.

Not such as to charge notice. See *Innocent Purchaser*, 3.

1. Possession, under the ten years statute of limitation, by construction, to the limits claimed in the deed under which it is held, ceased when the title passed from the possessor by execution sale, and thenceforth his possession was limited to the part actually occupied. *Doom v. Taylor*, 251.

2. When one places his property in the exclusive control of another the right to protect the possession from intruders and prevent any interference with the property arises from the duty of the one placed in possession to properly control and manage it. *Railway v. Bulger*, 478.

**Power of Attorney.**

Assignment made by an attorney without. See *Assignment*, 1.

1. Power of attorney is conclusively presumed in support of a conveyance by attorney, more than thirty years old, coming from the proper custody, and found to be genuine. *Simmonds v. Simmonds*, 151.

2. Though a power of attorney was on record which was not in itself sufficient to empower the attorney to sell land, still such power will be presumed



**Power of Attorney—continued.**

in favor of an ancient deed by the attorney where the grantor lived for over forty years after the sale and often declined to bring suit for the land. *Bean v. Bennett*, 398.

3. Suit by an attorney for recovery of a half interest in a tract of land as attorney fees, according to agreement in a power of attorney given, is not an action for specific performance of a contract to convey land, but one for the recovery of land, and the doctrine of stale demand can not be invoked as a defense, because the suit was not instituted within ten years from date of giving such power of attorney. *Betzer v. Goff*, 406.

4. A power of attorney conveying to attorneys one-half of all the lands of the donor, the title to which was recovered by them, held to include land held by parties claiming adversely under a tax deed, a quitclaim deed to which the attorneys secured by compromise. *Id.*

**Practice on Appeal.**

See Assignment of Error; Appeal; Appeal Bond; Transcript.

1. Objections to the admission of evidence, in order to be considered on appeal, should state the exact ground upon which the evidence is objected to. *Kesterson v. Bailey*, 235.

2. Where appellant has failed to file brief in the appellate court and offers no excuse for his failure to file it in the court below twenty days before the day set for the submission of the case, his application for leave to file brief will be refused and the appeal dismissed. Following *Harris v. Bryson*, 31 Texas Civ. App., 514. *Booker v. Anderson*, 436.

3. Where the amount of indebtedness due by defendants was determined in a former suit the question will not be inquired into on a subsequent suit to correct the description of property mortgaged therefor and have a new foreclosure. *Silliman v. Taylor*, 490.

4. A bill of exceptions complaining of the action of the court in refusing to allow a witness to answer a question put to him will not be considered on appeal where the bill does not show what the witness would have answered. *Shippers Co. v. Davidson*, 558.

5. In the absence of a statement of facts, proof that an executrix of an estate authorized her son as agent to make contracts or purchase property in the furtherance of the business of such estate under authority of the will, or ratified his acts after they were done, will be presumed, though defectively averred or omitted in the pleading of one suing upon a note or contract made by such agent of the executrix. *Ellis v. Howard Smith Co.*, 566.

6. A party who does not except to the findings of fact filed by the trial court can not attack such findings by cross-assignment on appeal. *Rev. Stats.*, art. 1333. *Buster v. Warren*, 644.

**Practice in Trial Court.**

See Conclusions of Law and Fact; New Trial; Witnesses.

**Prayer.**

Cancellation decreed under prayer for general relief. See *Building Association*, 1.

**Presumptions.**

As to regularity of official action. See *School Land*, 2.

As to State's right of control over territory claimed. See *Sovereignty*, 2.

Of power authorizing an ancient deed. See *Power of Attorney*, 1, 2.

In favor of judgment—no statement of facts. See *Judgment*, 2.

Agency or ratification presumed. See *Practice on Appeal*, 5.

Arising from patent. See *Public Lands*, 2.

Of continuance of relations. See *Illicit Relations*, 1, 3.

**Principal and Surety.**

See *Sureties*.

Where, in an action against a constable and his sureties for injuries resulting in death caused by the officer's wrongful act in making a lawful arrest verdict was rendered against the constable for \$500 and against the sureties for \$250, it was error for the trial court to render judgment thereon against both principal and sureties for \$500; nor was it proper for the appellate court, on reversal therefor to render the same judgment or any judgment on such verdict. *Black v. Moore*, 613.



**Privity of Estate.**

As subjecting to lis pendens rule. See Judgment, 4.

**Probate Sale.**

1. An order in administration proceedings for the sale of "one-third of a league of land the headright certificate of deceased" and report and confirmation of sale of "one-third of a league of land granted to the heirs of J. R., deceased, by the Board of Land Commissioners of Harrisburg County, No. 396, dated February 3, 1838," sufficiently identified the land ordered sold. *Boslet v. Thomas*, 144.

2. Where no order appeared closing administration, the power to make sale of property of the estate was not lost though ten years had elapsed without any order being made in the administration proceedings. *Id.*

3. A certificate by the clerk that a transcript from the probate records was a correct copy of all the proceedings had in the estate and entered of record in certain pages of two named volumes of the records, did not show that no other orders were made and entered. *Id.*

**Profits Lost.**

As measure of damages for breach of control. See Contract, 5.

**Promissory Note.**

See Indorser and Indorsee.

1. Where the action was on a promissory note, defendant's plea that the note had never been delivered was not sustained by proof showing that the note was given for part of the consideration of a sale of lands and cattle and that the seller and buyer jointly deposited the deeds and the note with a bank with instructions to deliver them to the parties respectively when the buyer should deposit with the bank the money called for by the note, which money he was to raise from a sale of the cattle he had so bought, and the cattle were delivered to and then sold by the buyer and the money placed in the bank, but the buyer instructed the bank not to apply it to the note until the seller had complied with a further condition which the buyer had not the right to exact. *Barnett v. Pyle*, 22.

2. Under such conditions the deposit of the money in the bank was not a tender of it in payment upon the note. *Id.*

3. Evidence considered and held to support a finding that a note given for wagons was without consideration, the wagons not being as represented, and that the indorsement of the note by the wagon company to a bank and suit thereby as an innocent purchaser was a mere fraudulent attempt to force the payment of an unjust claim, where the bank knew of such want of consideration and was protected by a bond from the wagon company indemnifying it against payment of costs, attorney fees or loss of suit. *Bank v. Blakey & Co.*, 87.

4. Where a promissory note contained this provision, "The makers and indorsers hereof hereby severally waive protest and nonpayment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to holder," its negotiable quality was thereby destroyed, and a subsequent indorsee who received it before maturity took it subject to the rights of one who held as collateral security a prior note by the same makers, secured by chattel mortgage, for which the note in question was given in substitution and renewal. *Bank v. Kenney*, 434.

**Proximate Cause.**

Charge on, held correct. See Charge, 11.

Negligence as, where there is contributory negligence from fright. See Negligence, 4.

Engine left on crossing frightening horse. See Railroads, 16; and see, also, Street, 1.

**Publication.**

Suit by. See Judgment, 3; Judgment by Default, 1, 3.

**Public Crossing.**

Duty to keep flagman at. See Railroads, 3.

See, also, Contributory Negligence, 9.

1. At a public crossing in a city it should be presumed that persons may be approaching at any time, and care should be taken to warn them of approaching cars whether such persons are discovered or not. *Railway v. Gibson*, 66.



**Public Crossing—continued.**

2. Article 453 of the ordinances of the city of Galveston, providing that it shall be the duty of those in charge of an engine in motion within the corporate limits "to cause the engine bell to be rung continually, and the whistle to be sounded at every street crossing," construed as requiring the bell to be rung continually while the engine is in motion regardless of whether or not it is at a street crossing. *Railway v. Levy*, 107.

3. Where a street abuts against a wharf upon which trains are operated, that part of the wharf at which the street abuts and which is used by the public as a highway is a prolongation of such street and the same diligence in giving signals, etc., is necessary as at any other street crossing, regardless of the ownership of the wharf. *Id.*

4. Though the omission of crossing signals required by statute or city ordinance may be negligence in law only with respect to persons using the crossing, circumstances may make it a question of fact whether the omission was negligence as to persons rightfully on the tracks at other points. *Id.*

5. The question of contributory negligence of a plaintiff injured by collision with an engine at a crossing held to be one for the jury. *Railway v. Matherly*, 604.

6. The admission in evidence of a city ordinance requiring a railway to keep an arc light at a certain crossing and refusal of defendant's requested instructions thereon can not be ground for reversal where the court refused Telephone line over, causing injury. See *Charge*, 15.

7. Failure to use ordinary care to discover and avoid injury to one rightfully using a public street crossing by railway employees operating its trains is negligence. *Id.*

**Public Domain.**

School lands are not, after award and three years occupancy. See *Mortgage*, 2.

**Public Lands.**

See *Public Domain*.

1. A homestead donation survey of public land, of 112 acres, was made for M. on March 21, 1877, and was afterwards reduced by corrected surveys to 91 acres. His proof of three years occupancy was of a tract of 143 acres, surveyed for him November 2, 1875, and such proof in no way showed the land surveyed on March 21, 1877, to be the land on which M.'s settlement was made, but patent was issued to M.'s heirs for the land as described in the proof of occupancy. After M. had left the land and his improvements thereon had rotted down, C. applied for a homestead donation survey which included the land, and after due proof of three years occupancy it was patented to him. Held, in a contest of title between C. and the heirs of M., that C. was entitled to judgment for the land, and to have the adverse prior patent canceled, since proper proof of occupancy was a condition precedent to the acquisition of title by M. and the issuance of patent therefor. *McClallahan v. Marshall*, 579.

2. While the patent issued to the heirs of M. furnished evidence that all steps required by law to authorize its issuance had been taken, such presumption arising therefrom could be rebutted and overcome by positive proof that such steps had not been taken. *Id.*

**Public Policy.**

As forbidding exemption by waiver of injury in free pass. See *Passenger*, 2.

Contract between railroads void as against. See *Interstate Commerce*.

**Public Records.**

Proof of. See *Evidence*, 1, 2.

**Public Roads.**

Telephone line over, causing injury. See *Charge*, 15.

**Public Weigher.**

The statute, General Laws, 1899, p. 266, prohibiting factors, commission merchants and other persons from weighing certain produce in a precinct where a public weigher has been appointed, applies only to factors, commission merchants and persons engaged in like business. *Whitfield v. Terrell Compress Co.*, 26 Texas Civ. App., 235, and *Galt v. Holder*, 32 Texas Civ. App., 564, 75 S. W. Rep., 570, followed. *Davis v. McInnis*, 574.



**Quitclaim.**

See Lease of School Land, 2.

**Railroad Commission.**

Requiring sidings and spur tracks. See Railroads, 1.

**Railroads.**

See Carriers of Freight; Carrier of Passengers; Condemnation of Land; Signals; Shipment of Cattle; Fellow Servants; Interstate Commerce.

Care owed to trespasser on train. See Trespasser, 1.

Notice to, through wrong agent. See Notice, 1.

Suit against several, one not served. See Parties, 1.

Not liable for mental suffering, having no notice of the matter. See Mental Suffering.

1. The Act of March 27, 1903, requiring railroads to build sidings and spurs when ordered by the Railroad Commission, authorizes the commission to require such construction for public purposes only and free from discrimination in favor of any individual. *Railroad Commission v. Railway*, 52.

2. An order of the Railroad Commission requiring a railway company to lay a spur track to the premises of a lumber company, the latter furnishing a graded right of way therefor, to be used by the lumber company for loading and shipping carload freight, with right of the railway to use same for the business of other shippers if it could be done without inconvenience to the business of the lumber company, contemplated a construction of track with preference to the individual shipper contributing to build it, not one to be used by the public without discrimination, as required of common carriers by the Constitution (art. 10, sec. 2), and the Railroad Commission could be enjoined from enforcing such order. *Id.*

3. It was not improper to charge the jury to find for plaintiff if the evidence established negligence in failing to keep a flagman at a crossing and they believed that it was peculiarly a dangerous one and that a person of ordinary caution would, under the circumstances, have kept a flagman there, where it appears from the circumstances, though not by direct testimony, that the crossing was extra hazardous, which the evidence here considered is held sufficient to show. *Railway v. Gibson*, 66.

4. One can not complain of a charge where it is apparent that he is not injured thereby, as where it only assumes uncontroverted facts. *Id.*

5. The court did not err in charging the jury to disregard the fact that the engine which struck plaintiff was owned and operated by a company other than the defendant, where it was operated on defendant's track by its permission and under orders from its office. *Railway v. Miller*, 116.

6. Recovery for permanent damages to property by the construction and operation of a railway in the street on which it abuts is barred in two years from such construction where such damages consist in the obstruction of the use of the street by such railway, or noise, smoke and vibration caused by a subsequently increased use of the track and not from a change in construction, or by diversion of surface water. *Tietze v. Railway*, 136.

7. Damages from such negligent maintenance of the railway embankment in a street as to obstruct, by dirt falling therefrom, the roadway beyond the limits of the embankment were not recoverable prospectively by the abutting owner at the time of the original construction, and are only barred in two years from the time such negligence caused injury, and so also as to negligent injury by the company in trimming shade trees in front of the premises, though it might trim them in a proper manner to prevent their interference with its trains. *Id.*

8. Facts considered and held to support a recovery for damages resulting from death of a watchman on railway bridge run down by train, by reason of negligence in running it at speed prohibited by the rules and without customary signals and in failing to use due care to discover his perilous position or to avoid striking him after discovering it. *Railway v. Brock*, 155.

9. At points where persons may be expected to be rightfully found on the track, those operating railway trains must exercise ordinary care in keeping a lookout for them. *Id.*

10. Plaintiff sued two Texas railroads in C. County, to which neither road extended, but to which a third road extended which was not sued nor alleged to be liable, and averred that the three roads connected and "formed a continuous line of railroad from C. County to Kansas City, Mo.," being the line over which plaintiff's cattle were shipped. Held, that the Act of 1899, page 214, providing that suit may be brought against any one or all of several railroad corporations in a county in which neither of such railroads extend or is operated, does not authorize suit to be brought against two railroad com-



**Railroads—continued.**

panies in a county in which neither of them extends or is operated, and that the defendants' plea of privilege to be sued in some other county should have been sustained. *Railway v. Forbes*, 255.

11. The question being one of venue and not jurisdiction, defendants could not be held amenable in C. County by virtue of having pleaded there their privilege to be sued in another county. *Id.*

12. In an action against a railroad company for the killing of horses permitted by the owner to run at large in a county where the stock law prohibiting this was in force, it was error to admit evidence showing a defective condition of the fence inclosing the railroad right of way, since the duty of maintaining such fence is not, as to injury to stock, obligatory on the railroad company where stock are prohibited from running at large. *Railway v. Dooley*, 364.

13. In such case the railroad company can not be held liable for stock killed on the track except on proof showing negligence upon the part of its train operatives in failing to prevent the injury after the discovery of the animals on or dangerously near the track, or otherwise showing such gross negligence as would be tantamount to this, since the animals are trespassers under the circumstances and their bare presence on the track is negligence on the part of their owners. *Id.*

14. The fact that the animals escaped from the owner and were at large without his knowledge does not affect the case, since it was his duty to prevent their running at large. *Id.*

15. Evidence considered and held to raise the issues of negligence on the part of defendant's employes in stopping its engine upon a crossing and allowing it to remain there an unnecessary length of time and of contributory negligence on the part of plaintiff in going upon the crossing under the circumstances, both of which issues should have been submitted to the jury. *Welborne v. Railway*, 401.

16. The negligent act of defendant in stopping its engine on a crossing and allowing it to remain there an unnecessary length of time held to be the proximate cause of the injury in the case of one whose horse took fright at the noise made by the engine, a usual and necessary incident to its operation, where the evidence reasonably showed that the horse would not have been frightened at the noise if the engine had been stopped at a proper distance from the crossing. *Id.*

17. Evidence considered and held to show that the foreman of a gravel train on which a steam shovel was being operated, was guilty of negligence in ordering the machinery to be moved at a time when plaintiff, one of the hands, was in a position to be injured thereby, and that the danger of such position, resulting from the order, was not a risk which plaintiff had assumed. *Railway v. Pelfrey*, 501.

18. Employes of a railway company engaged in loading a train of flat cars with gravel and hauling same to make a fill on the main line are engaged in "operating a train" within the meaning of the statute making railway companies liable for injuries to an employe resulting from the negligence of a fellow servant. *Id.*

19. The negligence of a fellow servant, concurring with that of a vice-principal, will not relieve the master from liability for injury resulting therefrom. *Id.*

20. Whether or not plaintiff was guilty of contributory negligence in occupying the position he was in at the time of the accident, instead of another position he might have taken, was an issue for the determination of the jury. *Id.*

21. A charge that it is the duty of a railway company's servants who operate its engines along a portion of its track that is commonly used by its employes, or over and about which its employes commonly pass in the discharge of their duties, to exercise ordinary care in keeping a lookout to discover the presence of such employes on or in close proximity to the track at such point, and to use all means in their power consistent with the safety of the engine and its operatives, to stop the engine to prevent a collision with or injury to such employes—held warranted by the pleading and evidence disclosed in the opinion, and to announce a correct principle. *Railway v. Jones*, 584.

22. Such charge did not make it the absolute duty of those operating the engine to stop it on approaching a place in the track commonly used by the employes, but to use all means in their power to prevent injury to them. *Id.*

23. A charge held not to assume that the deceased was not guilty of negligence in slipping and falling and being on the railway track at the time he was injured—the charge requiring the jury to believe that he was exercising



**Railroads—continued.**

ordinary care for his own safety at the time, and being followed by a special charge, given at defendant's request, instructing that the burden of proof was on plaintiffs to show that the deceased was free from negligence. *Id.*

24. The intoxication of the deceased at the time of the injury would not, of itself, preclude a recovery for causing his death, since, to have that effect, the intoxication must have contributed to or proximately caused his injuries. See charges held to correctly present that issue. *Id.*

25. Where the defendant had not pleaded assumed risk, it was not error for the court to refuse to submit that issue to the jury. *Id.*

**Ratification.**

See Building Contract, 1; Married Woman, 1.

**Recitals.**

In trustee's deed as evidence. See Trust Deed, 4.

In land certificate disproved. See Land Certificate, 1, 2.

Of service in judgment. See Judgment by Default, 1.

**Reconvention.**

1. Plaintiff sued in trespass to try title to recover surveys 91 and 27, described by metes and bounds, the trouble growing out of a conflict of these surveys with surveys 90 and 28, claimed by defendants, who reconvened in the suit, asserting title to the latter surveys, described by metes and bounds different from those of plaintiff's surveys, and that plaintiff's claim was a cloud on their title, with prayer for affirmative relief. Plaintiff having taken a nonsuit, the case was tried, over his objections, on the cross-pleas of the defendants. Held, that defendants were entitled under their pleadings to the relief asked, and that such relief could not have been had under their defensive pleadings to plaintiff's suit. *Smithers v. Smith*, 508.

2. Plaintiff having appeared and answered in the trial of the cross-action by defendants, it did not affect the jurisdiction of the court to render judgment that he was not served with citation on the filing of the cross-pleas. *Id.*

3. Plaintiff, a nonresident, having brought his action in a State court, thereby submitted himself to its jurisdiction to its whole extent, as determined by the State statutes, and did not, by reason of defendants' pleas in reconvention, become a defendant so as to be entitled to remove the cause to a Federal court. *Following Waco Hardware Co. v. Michigan Stove Co.*, 91 Fed. Rep., 289. *Id.*

**Registration.**

Of deed in order to claim possession to its boundaries. See Limitations, 4.  
Lien valid without. See Builder's Lien, 3.

**Remainderman.**

Limitations run against, from what time. See Limitations, 1.

Unborn child as. See Will, 8.

Heirship of. See Heirs, 1.

**Remittitur.**

See Damages, 1; Verdict, 1.

**Removal of Cause.**

By nonresident plaintiff. See Reconvention, 3.

**Rescission.**

See Contract, 8; Contract of Leasing, 1; Partnership, 1; Vendor's Lien, 1.

**Res Gestae.**

Statements five minutes after the injury. See Evidence, 33.

**Res Judicata.**

See Practice on Appeal, 3.

**Sale.**

See Probate Sale; Sale in Fraud of Creditors.

By trustee after debt barred. See Trust Deed, 1.

Of machinery and building with different liens thereon. See Liens, 2.

See, also, Partnership, 1.



**Sale—continued.**

A contract for purchase and shipment of corn, to be paid for by the buyer at a named rate per bushel, with the stipulation that it was sold "on Kansas City weights and grades," was ambiguous, and evidence was admissible to show that such stipulation was intended to relieve the seller from loss by waste and shrinkage in shipment, but not from fraud or gross mistake in the Kansas City weights. *Grain Co. v. Hubby and Gorman*, 65.

**Sale in Fraud of Creditors.**

1. Evidence considered and held not to show conclusively that a sale for value of his entire stock of goods, by one who was at the time insolvent, was in fraud of creditors, but to require submission of that issue to the jury. *Drug Co. v. Durham*, 71.

2. The fact that one buying from an insolvent has notice of such insolvency and pays cash for a stock of goods without seeing that the money is applied to creditors, does not, of itself, render the sale fraudulent; notice of intent to defraud creditors is necessary. *Id.*

**Sale of Land.**

Agent making, allowed expense of abstracts. See *Agent*, 1.

Finding buyer as entitling agent to commissions. See *Pleadings*, 3, 4.

**School Land.**

See *Contract of Leasing*; *Lease of School Lands*.

Proof of classification of, from Land Office records. See *Evidence*, 1-3.

Subject to mortgage, when. See *Mortgage*, 1.

See, also, *Estoppel*, 1.

1. W., an actual settler on a pre-emption survey, made application to purchase an adjoining survey of school land, intending to purchase it as "additional land," but through mistake, he being old and ignorant, the application was made out for the purchase of the school land as an actual settler on it. W. was entitled to purchase the land as additional land, and the statements of the application as made showed that fact. The Commissioner awarded the land to W., and after attention was called to the mistake, rejected L's subsequent application to purchase it as an actual settler and L. brought this action of trespass to try title against W., for the land. Held, that W. was entitled to judgment for the land, notwithstanding the mistake. *Weckesser v. Lewis*, 18.

2. L's action being a collateral attack on the sale by the Commissioner, who had the power to prescribe the form of the application, it may be presumed, in the absence of a contrary showing, that W's application sufficiently complied with the form then in use as to application to purchase additional land, or that the regulations of the Land Office authorized the correction of such a mistake where the facts warranted the sale. *Id.*

3. Plaintiff sued in trespass to try title to recover a tract of school land lying across the line of K. and S. counties, and by virtue of a rejected application to purchase made by him in K. County under the Act of April 19, 1901. The land had been awarded by the Commissioner to defendants by virtue of an application made in S. County, the validity of which plaintiff assailed on the ground that the Commissioner had not given notice to the county clerk of S. County of the classification and valuation of the land. Held, that such objection could not avail plaintiff, since, if tenable, no valid award of the land could have been made to him without notification to the clerks of both the counties. *Davis v. Burnett*, 30.

4. It was error for the trial court to exclude evidence offered to show that plaintiff was not an actual settler where defendant had settled on and made application to purchase the land in controversy before proof of occupancy was made by plaintiff to the Commissioner of the General Land Office. *Par-due v. White*, 21 Texas Civ. App., 121; *Logan v. Curry*, 95 Texas, 664, distinguished. *Forrester v. Berry*, 175.

5. The application of plaintiff "W. M. Read" to purchase public school land was not invalidated by the fact that it was made under the name "Wm. Reed," where the evidence identified plaintiff as the applicant. *Goethal v. Reed*, 461.

6. An affidavit for purchase of school land for a home was not invalid because it omitted the word "land," where other parts of the application identified the section in question as the home desired. *Id.*

7. On the issue of a purchaser's intention in good faith to buy school land for a home, the purchaser may himself testify to such intention and to the absence of collusion with others. *Id.*

8. An application to purchase together several sections of school land, with



**School Land—continued.**

affidavit that applicant is an actual settler thereon, but without designating, except by a memorandum in pencil on the application, "settlement is on number 4," gives the applicant no right, being insufficient to show which was purchased as the home and which as additional sections. *Id.*

9. An application to purchase more sections of agricultural land than the applicant was entitled to buy gave no right to him as against a subsequent applicant, and it rested upon him to show that an amendment striking out one of the sections and reducing the amount to such as he was entitled to purchase was made before the application of such subsequent purchaser to buy. *Id.*

10. A tract of school land was awarded by the Land Commissioner to N. upon his application to purchase it as an actual settler. N. transferred the land to H., who became an actual settler thereon, and was accepted as substitute purchase by the Commissioner. Held, that H. was entitled to protection equally as N. would have been against an assault upon the title by a third party, a subsequent applicant, made on the ground that the original purchase was collusive—a question which, after award of the land, can be raised only by the State. This conclusion would follow, it seems, even though the circumstances attending the transfer from N. to H. had the effect of a forfeiture for nonoccupancy. *May v. Hollingsworth*, 665.

11. A charge defining an actual settler on school land as "one who actually occupies and settles upon the land intending to make it his home," is not subject to serious objection. *Id.*

**Secondary Evidence.**

See Evidence, 40; Notice to Produce, 1, 2.

**Shipment of Cattle.**

See Carriers of Freight, 6-8.

1. Although there was no proof of the value of cattle, alleged to have been injured by delay in furnishing cars, on the day they arrived at defendant's pens other than shown by the contract of sale, yet it was proper to refuse a peremptory charge in defendant's favor where plaintiff's proof outside the contract of sale entitled him to at least nominal damages. *Railway v. Musick*, 591.

2. In the absence of notice of the contract of sale of cattle and complaint that special damages were suffered with reference thereto, the contract of sale made before shipment not having been pleaded, the sale price and the contract price could not properly furnish the measure of damages for a failure on the part of the railway to promptly furnish cars for shipment. *Id.*

3. Charge placing liability upon defendant for failure to feed and water cattle during shipment, such liability to attach from the time of delivery and acceptance, held error in view of the undisputed evidence that plaintiff, for a valuable consideration, had assumed that duty. *Id.*

4. A charge giving the measure of damages as the difference between the market value of the cattle when they should have arrived and when they did arrive at their destination, and also the deterioration in the condition of the cattle due to delay in shipment was erroneous as authorizing a double recovery, the pleading only seeking recovery for deterioration in condition of cattle and not for a fall in the market price. *Id.*

**Signals.**

Giving at crossings. See Public Crossing, 2, 3, 4; Negligence, 7.

Pleading and evidence held to present and warrant submission of issue as to defendant's negligence in increasing the fright of a horse by sounding the bell or gong of a suburban car after perceiving that such sound was having such effect. *Railway v. Powell*, 454.

**Signature.**

Need not be at foot of instrument. See Contract, 2.

**Sovereignty.**

1. The sovereignty of territory is a political question, and where the State exercises its authority de facto over a strip of land (one left by avulsion) the court will treat that as conclusive and exercise its judicial authority over such strip. *Rodriguez v. Hernandez*, 78.

2. It was improper for the court to hold that there is a conclusive presumption, in support of the rightful exercise of jurisdiction by the State over a strip of territory, that the strip had been added by accretion, the court's right



**Sovereignty—continued.**

to exercise jurisdiction depending upon the State's de facto and not its de jure control of such territory. *Id.*

**Specific Performance.**

Land suit held not to be one for. *See* Power of Attorney, 3.

**State Demand.**

Not applicable to proceeding to compel filing of final account. *See* Administration, 3.

Not applicable to suit for land. *See* Power of Attorney, 3.

**State Treasurer.**

Rendering for taxation bonds deposited with him. *See* Foreign Corporation.

**Statute of Frauds.**

*See* Deed, 3.

**Statutes Cited and Construed.****[Revised Statutes of 1895.]**

- Art. 214. Attachment foreclosure. P. 418.
- Art. 309. Suit by assignee of contract. P. 468.
- Art. 558. Proof of city ordinance. P. 547.
- Arts. 624, 628. Conveyance of land. P. 208.
- Arts. 920, 926. Bond of county treasurer. P. 363.
- Art. 1374. Motion for new trial. P. 498.
- Art. 1401. Proof of inability to secure costs of appeal. P. 131.
- Arts. 1498, 1499. Substituting lost records. P. 603.
- Arts. 1984, 1985. Executor renting out estate property. P. 342.
- Arts. 1995, 1996. Suits against decedent's estates. P. 169 et seq.
- Art. 1996. Suits and executions against estates of decedents. P. 167.
- Art. 2057. Partition of decedent's homestead. P. 396.
- Art. 2197. Administrator's accounts. P. 315.
- Arts. 2251, 2255. Adjudging probate costs. P. 316.
- Art. 2304. Proof of laws, how made. P. 547.
- Art. 2306. Proof of public records. P. 26.
- Arts. 2626, 2627. Judgments in favor of minors. P. 565.
- Art. 2742. Guardianship of lunatics. P. 396.
- Art. 3017. Action for death. P. 561.
- Art. 3353a. Assigning course of action. P. 468.
- Arts. 4045-4048. Examining records and files of Land Office. P. 26.
- Art. 4061. Wife's acknowledgment of deed. P. 290.
- Arts. 4218fff, 4218j. Affidavit for purchase of school lands. P. 19.
- Art. 4218j. Residence on school land required. P. 176.
- Art. 4509. Separate coaches for negroes. P. 520.
- Art. 4560h. Fellow servants. Pp. 56, 344.
- Art. 4647. Transfer of judgment. P. 468.
- Arts. 5061-5084, 5107-5118, 5176. Assessment of property for taxation. P. 227 et seq.
- Art. 5159. Tax collector's bond. P. 363.
- Art. 5164. When tax collecting begins. P. 363.

**Stock Law.**

Killing stock where law in force. *See* Railroads, 12-14.

**Street.**

Damages caused by railroad built and operated in a street. *See* Railroads, 6, 7.

Tax on homestead for street improvements. *See* City Charter, 2.

Care in operating electric car along. *See* Evidence, 21.

1. The act of defendant, a compress company, in obstructing a public street by a gangway over which bales of cotton were moved on trucks from one platform to another was negligence per se and the company was liable for the death of one whose horse took fright at the noise made by a servant of defendant engaged in moving cotton, a proximate cause being the negligence of defendant in erecting the obstruction. *Shippers Co. v. Davidson*, 558.



**Street—continued.**

2. Defendant compress company can not complain of a charge requiring the jury to find, as a condition of recovery, that the work of trucking bales of cotton over a gangway across a street was under the direction of its general agent, and that there was no flagman to warn the people of the danger of such crossing, since neither condition was necessary to a recovery; the act of defendant in obstructing the street was in itself negligence which would render it liable for accidents proximately resulting therefrom. *Id.*

**Street Railway.**

Care in operating electric cars. See Evidence, 21.  
Plaintiff was not guilty of contributory negligence in stepping back from the track, upon the approach of a car, only a sufficient distance to avoid being struck by cars such as were ordinarily run on said track, he not knowing that the steps on the car which struck him extended further out from the body of the car than those generally in use and not being able to ascertain such fact because of the blinding light on the car. *Railway v. Craig*, 548.

**Substance of Issue.**

Sufficiently proved. See *Allegata and Probata*, 2.

**Substitute Trustee.**

Recitals in deed as proof of his appointment. See *Trust Deed*, 4.

**Substitution.**

Of lost petition. See *Lost Papers*.

**Surety.**

See *Principal and Surety: Official Bond*.

Liability for malfeasance of officer. See *City Officer*, 4.

A bond to secure C. was signed by S. and N. as sureties for the obligor S. instructing C.'s agent at the time, and in the hearing of N., that the bond was not to be delivered until one B. had also signed it as a surety, but the bond was delivered and accepted without B.'s signature and without knowledge on the part of the sureties that his signature had not been obtained. Held that the condition and failure to comply therewith operated to release N. as well as S., since N. signed with the understanding that the bond was not to take effect without B.'s signature. *Norris v. Cetti*, 28.

**Surety Company.**

Deposit to secure. See *Garnishment*.

**Taxation.**

Of bonds deposited with State Treasurer. See *Foreign Corporation*, 1, 2.

Of homestead for street improvements. See *City Charter*, 2.

See also, *County Taxes*.

1. The State has power to tax all personal property within its jurisdiction though the owner resides beyond the State. *State v. Deposit Co.*, 214.

2. Municipal bonds and securities, though issued by a city in and owned by a citizen of another State, assume a concrete form beyond that of mere evidence of debt, which gives them a tangible situs and renders them subject to taxation in Texas when brought here by the owner and employed in his business within the State. *Id.*

**Tax Rolls.**

Collector receiving taxes before rolls delivered to him. See *County Taxes*, 1.

**Telegraphs.**

Proof of telegram—copies. See Evidence, 40.

1. In an action against a telegraph company for mental suffering resulting from failure to promptly transmit and deliver a message informing plaintiff of the dangerous illness of his father, whereby he was deprived of the privilege of attending the funeral, it was error for the court to admit, over objection, the testimony of a witness to the effect that, before the message was sent, the father said, "It is hard to die without friends or relatives about you. I want you to send word to all the children if anything should happen to me, if I should get sick," since such evidence had no legitimate



**Telegraphs—continued.**

bearing upon the issue to be determined, and was calculated to unduly excite the sympathies of the jury. *Telegraph Co. v. Jackson*, 419.

2. Where a message was delivered to a telegraph company at a point in Arkansas for transmission to a point in Texas, a recovery for damages for mental suffering resulting from a failure to deliver the message could not be had in the Texas courts, since the contract is governed by the law of the place where it was made, and the law of Arkansas does not authorize a recovery of damages for mental suffering alone in such a case. *Following Telegraph Co. v. Waller*, 9 Texas, 89. *Telegraph Co. v. Buchanan*, 437.

3. The undertaking of a telegraph company with the sender of a message being for personal delivery to the addressee, and not carried out by reason of the failure of the sender to pay the charges beyond free delivery limits when notified thereof, the fact that the message was addressed by the operator to the care of another person, within free delivery limits, to enable the proper address to be ascertained by the company from him, did not make it the duty of the company to deliver to such other person; and parol evidence was admissible to explain the true contract and why the message was addressed in his care. *Telegraph Co. v. Bryant*, 442.

4. Where the testimony was positive to the effect that if the first of two undelivered messages had been delivered plaintiff's wife would have gone on the next train to her sister's bedside, and there is nothing in the record to indicate that she would have done otherwise if the second message had been delivered, except the bare fact that she and her husband failed to state what she would have done in that contingency—such omission being evidently due to the fact that no such question was propounded—and their whole testimony went to show that she would have gone, the court was justified in submitting to the jury the issue of whether or not she would have gone. *Telegraph Co. v. Ridenour*, 574.

5. An assignment of error that the court erred in submitting to the jury as a basis of recovery the failure of defendant to deliver the second message does not raise the question of whether or not the court erred in not restricting the extent of recovery sought on that basis to the injury sustained by plaintiff's wife in being deprived of being present at her sister's funeral—the evidence establishing clearly that she could not have reached there prior to her sister's death. *Id.*

**Telephone Line.**

Over public road—Injury therefrom. See *Charge*, 15.

**Tenancy at Will.**

See *Lease*, 2.

**Tenants in Common.**

Lessor and lessee—rent in kind. See *Conversion*, 2.

The recovery by tenants in common of an undivided half interest in land, without partition, does not affect the claim of the tenants in possession for improvements; under subsequent proceedings for partition defendants should be awarded the half containing improvements made by them, or as much of them as practicable, regardless of the question of good faith. *Kesterson v. Bailey*, 235.

**Tender.**

Offer construed not a tender. See *Conversion*, 4.

Deposit in bank as not a tender. See *Promissory Note*, 2.

**Tenure of Office.**

Limited by Constitution to two years. See *City Officer*, 1.

**Title.**

After acquired passing by estoppel. See *Mortgage*, 1.

See also, *Equitable Title*; *Trespass to Try Title*.

**Title to Land.**

One can not recover beyond his title, and defendant in trespass to try title should have been allowed to show that the position of plaintiff's real boundary, the Rio Grande, was determined by the old river channel and that



**Title to Land—continued.**

he had no right to recover to the new river bed, where the channel of the river had been changed by avulsion. *Rodriguez v. Hernandez*, 78.

**Tort.**

Liability of joint tort feassors. See *Carrier of Passengers*, 7.

A right of action for injury by trespass to the real property of a decedent during her life, being assignable, survived her death and could be maintained by her heirs. *Railway v. Smith*, 351.

**Transcript.**

The inclusion of matters not properly belonging in the transcript (a motion for continuance on which no errors were assigned and affidavits relating to exceptions not saved by bill) was not ground for striking out the statement in the appellate court, but merely for taxing appellant, though successful, with the unnecessary cost incurred. *Railway v. Phillips*, 337.

**Trespasser.**

On freight trains run at high speed. See *Contributory Negligence*, 7.

One riding on a freight train, against the company's rules, is a trespasser and the company owes him no duty save not to willfully or wantonly injure. *Railway v. Mayfield*, 82.

**Trespass to Try Title.**

See *Reconvention*, 1.

1. In trespass to try title and cancel a deed where the undisputed evidence showed that the rental value of the premises during the period of defendant's possession and use thereof exceeded the value of his improvements, there was no basis upon which the jury could have predicated a verdict in his favor for the value of the improvements, and the court did not err to his prejudice in omitting to submit such issue. *Wilson v. Wilson*, 192.

2. In such action, while counsel for defendant was arguing the law to the court, the court stated that it did not desire to hear argument on the question of the delivery of the deed, as the jury would be charged, as an undisputed fact, that the deed was delivered. Such charge was not given, but the delivery of the deed appears to have been treated by the court and all the parties litigant as an established fact. Held, that defendant was not injured in being misled and deprived by the remark of the court of the benefit of an argument to the jury on the matter of the delivery of the deed. *Id.*

3. The fact that the deed from plaintiff to defendant, her son, was absolute on its face and was delivered to defendant, would not prevent plaintiff, under proper allegations, from showing that the agreement was that it was not to take effect until plaintiff's death, and its consideration was to be that the grantee would support her during life, and that she was to retain control of the premises, and that she was unable to read, and signed the deed relying upon the grantee having prepared it in accordance with the agreement. There was no assent of the grantor's mind to the deed that was executed, absolute in terms and reciting the consideration to be one dollar and love and affection. *Id.*

4. A suit for the recovery of land is properly brought by a joint owner in whom the legal title is vested, and without the joinder of a co-owner having an equitable title only. *Jones v. Robb*, 263.

5. Evidence held not to show that a suit brought in 1866 in the name of the owner was brought without his authority. *Id.*

6. Plaintiff in trespass to try title can recover, though failing to show title from the sovereign, on proof of title under conveyance from defendant and defendant's acceptance of a holding under him as his tenant. *Tiemann v. Cobb*, 289.

7. Defendant who has plead specially title by conveyance from one whose rights plaintiff shows that he has by older conveyances, can not defeat plaintiff's recovery under his plea of the general issue by a superior outstanding title under which he does not show by his pleading that he claims. *Id.*

**Trust.**

Admission of receipt of money as not establishing. See *Limitations*, 5.



**Trust Deed.**

1. A trustee may sell, under the power conferred on him by a trust deed, though the debt it was given to secure is barred by limitation, nor does such limitation bar a suit by the purchaser at such sale to recover the land. *Goldfrank v. Young*, 64 Texas, 432, and *Dimmit County v. Oppenheimer*, 42 S. W. Rep., 1029, followed; and *McKeen v. James*, 23 S. W. Rep., 676, and *Fievel v. Zuber*, 67 Texas, 275, distinguished. *Brinkerhoff v. Goree*, 142.

2. Evidence considered and held insufficient to compel a conclusion that the holder of a debt secured by trust deed but barred by limitation had abandoned his claim. *Id.*

3. A written appointment, by the person secured by a trust deed, of a substitute trustee, reciting that the original trustee had declined to act, was evidence of the appointment of the substitute, but not of the happening of the contingency, the refusal of the original trustee to act, which by the terms of the trust deed authorized such substitution. *Ward v. Forrester*, 319.

4. A provision in a deed of trust, that, in any deed given by any trustee thereunder, any and all statements of fact or other recitals therein made as to the nonpayment of the money secured, or as to the time, terms and place of sale and property to be sold having been duly published, or as to any other preliminary act or thing having been duly done by said trustees should be prima facie evidence of the facts so recited, did not make the recital by a substitute trustee of the refusal of the original trustee to act evidence of such fact. *Id.*

**Trustees.**

See Charitable Devise.

**Unaccepted Draft.**

1. An unaccepted draft is no evidence of indebtedness against the drawee. *Gamer v. Thomson*, 283.

2. An unaccepted draft, unless so framed as to constitute an assignment of the debt of drawee to drawer, does not have that effect; the drawee is not, then, a necessary or proper party to a suit on the draft, and may claim his privilege of being sued in the county of his residence, though joined as defendant with the drawer and indorsers who reside in the county where suit was brought. *Id.*

**Usury.**

1. One who has not promised or paid usury to a bank on a loan made by it, but has merely agreed to indemnify the bank against a judgment collaterally connected with the loan as to which usury is claimed, has no right to recover a penalty for usury which he can assign to another. *Trading Co. v. Bank*, 5.

2. The fact that upon a loan of money by a bank it exacts as a condition to making the loan that the borrower shall secure to it the payment of another genuine and subsisting debt to it for which the borrower is liable, does not render the loan usurious; nor is the case altered by the fact that the other debt is of such nature that the borrower, upon paying it, can not have contribution from the other parties jointly liable with him therefor. *Id.*

3. Pleading held to show a contract, in form one for the construction of a house at a fixed price, to be in effect an usurious contract for the loan of money; and evidence held to support a finding of the facts so pleaded. *Matthews v. Texas B. and L. Assn.*, 48 S. W. Rep., 744, distinguished. *Savings Assn. v. Cornibe*, 385.

**Value.**

Of live stock at point of destination. See Carriers of Freight, 6-8.

Of land taken. See Condemnation of Land, 3.

Opinion evidence of, held not admissible. See Measure of Damages, 1.

See, also, Market Value.

**Vendor's Lien.**

The right of a vendor retaining an express lien, when limitation is pleaded to a part only of the debt for purchase money on which he seeks foreclosure, is to rescind the entire sale, or not at all; he can not rescind as to the note barred and recover back its proportional interest in the land, while proceeding to enforce his lien as to the other purchase money notes. *Wilkerson v. Bacon*, 44



**Venue.**

In suit against connecting liens. See Railroads, 10, 11.  
Change of. See Lis Pendens, 2, 3.

**Verdict.**

Excess in cured by remittitur. See Damages, 1.

As curing defect in pleading. See Pleading, 9.

Not warranting the judgment rendered. See Principal and Surety, 1.

1. Verdict of \$1000 for slight personal injury considered excessive and a remittitur of \$750 required as a condition of affirming the judgment. *Railway v. Gibson*, 66.

2. Evidence considered and held to support a verdict of \$7500 as not excessive, in the case of a railway switchman being thrown from the top of a moving box car by reason of a defective brake. *Railway v. Reeves*, 162.

3. Upon a verdict being apportioned by the jury between the wife and minor children of deceased, the court had no authority to render judgment for one-half to their attorneys, in accordance with a written agreement. Money adjudged to the minors could only be paid out by a guardian under orders of the probate court. *Shippers Co. v. Davidson*, 558.

4. A verdict will cure defective pleading except where there is a total omission to state a cause of action. *Ellis v. Howard Smith Co.*, 566.

5. A verdict for \$10,416, for negligently causing the death of a colored coal heaver, 32 years of age and earning \$45 per month, held large, but not so large as to show that it was the result of passion or prejudice on the part of the jury. *Railway v. Jones*, 584.

**Vice Principal.**

See Fellow Servant, 1.

**Voter.**

Identity of—proof. See Contested Election, 6.

**Waiver.**

In free pass of any claim for damages. See Passenger, 2.

Of venue by plea of privilege. See Railroads, 11.

Of lien. See Landlord's Lien, 2.

Of right to rescission. See Contract, 8.

Of citation by appearance. See Reconvention, 2.

**Warehouseman.**

See Carriers of Freight, 3.

**Weight of Evidence.**

Charges on. See Charge, 2; Electricity.

**Wharf.**

See Public Crossing, 3.

**Wife.**

Not joining in agreement to give lien on homestead. See Contract, 8.

Interest of, after divorce, in policy on husband's life. See Life Insurance, 2, 3.

**Will.**

See Charitable Devise; Devise.

1. Application was made to probate a will by which the testator left his property "to the poor people of M.," and to have a trustee appointed to carry it into effect. The application was denied, and the mayor of M. then intervened and applied for a rehearing, which was also denied. Afterwards the city attorney, claiming to represent the mayor, and an attorney claiming to represent J. H. and the other heirs of the decedent, made a compromise agreement in the private office of the county judge by which certain notes belonging to the estate were set over to the mayor. The agreement was never entered up as the judgment of the court, nor any memorandum thereof entered on the docket. Later the mayor tendered into court the proceeds of the notes, asking that the compromise agreement be entered up as the judgment of the court and a trustee appointed to distribute the proceeds of the notes. The heirs resisted such appointment and asked that such proceeds be awarded to them. The mayor testified that he did not authorize the city attorney to



**Will—continued.**

make the compromise, and the testimony of the attorney who represented the heirs in making it showed only that he represented J. H., but what interest J. H. had in the estate did not appear. Held: (1) That the court properly refused to enter a nunc pro tunc judgment on the compromise agreement at a subsequent term of the court. (2) That no authority was shown for making the compromise agreement. *Lake v. Hood*, 32.

2. The provision of a will empowering executors to act independently of orders or interference from the probate court was not invalidated by a further provision that the executors should file, from year to year, with the probate court a report showing the condition of the estate, especially where it is expressly stated that the purpose of the filing of this report is that it may be seen by creditors and heirs. *Epperson v. Reeves*, 167.

3. Article 624, Revised Statutes, providing that a conveyance of interest in land from one person to another shall be in writing duly subscribed, applies to deeds and not to wills. *Gidley v. Lovenberg*, 203.

4. It is not held that a bequest may not be void because of a defective description of the thing intended to be conveyed, but where such thing is identified by sufficient description the intention of the testator will be carried out if it can be gathered from the entire instrument, and the broadest liberality in construction is allowed in ascertaining such intention. *Id.*

5. See will construed as passing title to lots and improvements and not merely to rent from the same. *Id.*

6. Where a will provided for the establishment, by the executors, of a charitable institution, after the death of certain devisees, from rents which were to go to each devisee during their lifetime, the fact that the devisees outlived the executors and the institution was never established by the executors named in the will for such purpose can not defeat the general purpose of the testator in the establishment of the charity. *Id.*

7. A will establishing a "widows and orphans home, \* \* \* contributing as far as possible toward ameliorating the condition and comforting the unfortunate of that class," held not subject to the objection that the class named as beneficiaries is too indefinite and includes all widows and orphans regardless of whether they are in need of charity, where the intention of the testator was that such home should be for the care of the poor and needy. *Id.*

8. A clause in a will bequeathing a tract of land to the testator's wife and at her death to a child then unborn, held to vest an estate in remainder in the child upon its being born alive. *Kesterson v. Bailey*, 235.

9. The rule in *Shelley's* case does not apply to a devise of a contingent remainder to the child en ventre sa mere of the devisee of the life estate, though described as her heir: the estate in remainder vests in such child, if born alive, and passes to its heirs upon its death. *Id.*

**Witnesses.**

Impeachment of. See Evidence, 18.

1. It is within the discretion of the court to limit the number of witnesses to a given point, and his action in refusing to permit more than six impeaching witnesses was not ground for reversal unless there was something else to show abuse of his discretion. *Donaldson v. Dobbs*, 439.

2. Under the rule that in impeaching a witness the examination must be confined to his general reputation and not include particular facts, the court properly sustained objections to a question asked of a witness whether he had ever been indicted for perjury, and the introduction in evidence of an indictment charging him with this offense; no presumption of guilt arose from such indictment. *Railway v. Bulger*, 478.

**Written Contract.**

In suit on a written contract for the purchase of a sodawater fountain which stipulated that the purchaser agreed not to countermand the order and if so the company should not recognize the same, it was error for the court to admit parol evidence that at the time of the sale it was verbally agreed between the parties that if, upon receipt of the fountain, it proved unsatisfactory to the purchaser, he need not accept it. *Fountain Co. v. Pressler*, 360.



















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